No. 01-8419-CSY Title: Kennedy D. Kirk, Petitioner
v.
Louisiana

Docketed: February 20, 2002 Court: Court of Appeal of Louisiana, Fourth Circuit

Entry	Date	Proceedings and Orders
	Feb 5 2002	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 22, 2002)
	Apr 4 2002	DISTRIBUTED for Conference of April 19, 2002
	Apr 12 2002	Response requested.
	May 13 2002	Brief of respondent Louisiana in opposition filed.
	May 17 2002	Lodging containing one copy of the transcript of Lower Court material received.
	May 29 2002	REDISTRIBUTED for Conference of June 13, 2002
	Jun 17 2002	REDISTRIBUTED for Conference of June 20, 2002
	Jun 24 2002	Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam. (Detached opinion.)
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01-9419

(2)

SUPREME COURT, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNEDY KIRK, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

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46 pp

QUESTIONS PRESENTED FOR REVIEW

Are the three dissenters on the Louisiana Supreme Court correct that the New Orleans Police Department violated the Fourth Amendment to the United States Constitution's "firm line at the entrance to the home" when six officers forcibly entered Kennedy Kirk's apartment without a warrant after a three hour surveillance and held Kirk and his co-defendant inside while one of the officers went to apply for a warrant?

Was the four judge majority of the Louisiana Supreme Court correct in letting stand the lower appellate court's decision that probable cause to make a warrantless arrest of Kirk and his co-defendant inside their apartment created an exception to the search warrant requirement to enter, seize them, and search them?

Where there is no evidence that the occupants of an apartment under surveillance to corroborate an anonymous tip knew the police were in the area until the police approached the door to force entry, is an officer's speculation that evidence might be destroyed if persons in the apartment learned of their presence the sort of emergency or exigent situation that would justify a warrantless entry into a home for the purpose of either arrest or search?

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La.R.S. 40:967

Louisiana Constitution of 1974, Article 1, Section 5

Louisiana Constitution of 1974, Article 1, Section 19

NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

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KENNEDY KIRK, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDENT

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PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

The Petitioner, Kennedy Kirk, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court for the State of Louisiana, by a four to three decision, which denied relief to Petitioner in this matter on November 9, 2001, which is within ninety days of this Petition for Writ of Certiorari.

OPINION BELOW

On November 15, 2000, the Louisiana Fourth Circuit Court of Appeal affirmed the trial court's denial of the Motion to Suppress the evidence and the conviction of Kennedy Kirk. A copy of the published opinion is attached to this petition as Appendix 2. State v. Kirk 2000-KA-0190, 773 So.2d 259 (La. 4 Cir. 11/15/2000). Kennedy Kirk applied to the Louisiana Supreme Court for a writ

of certiorari. It was denied in a four to three decision on November 9, 2001. A copy of the majority of the Louisiana Supreme Court's judgment denying discretionary review is attached as Appendix 1. One of the three dissenting Louisiana Supreme Court judges assigned reasons which are also included in Appendix 1 to this petition. State of Louisiana v. Kennedy Kirk 2000-3395 (La. 11/9/01), 801 So.2d 1063. (App. 1).

JURISDICTION

The four to three decision of the Supreme Court for the State of Louisiana denying the Application for Certiorari by Kennedy Kirk and upholding the lower appellate court decision was entered on November 9, 2001. This Petition for Writ of Certiorari is filed within ninety days of that date, pursuant to Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND FEDERAL PROVISIONS INVOLVED

Fourth Amendment to United States Constitution: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment, Section 1, to United States Constitution: "... nor shall any state deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

Six New Orleans Police officers shoved their way into Kennedy Kirk's apartment at 2316 Washington Avenue, Apartment 15, without a warrant of any kind. Upon pushing open the door and

entering, the officers seized and frisked Kirk and his co-defendant, Paul Cook. The police handcuffed both men. During the frisk for weapons, a medicine bottle with fifty-six rocks of cocaine was taken from Kirk's underwear. The police seized a bottle with some rocks of cocaine from Cook and a gun from Cook's chair. At least four officers stayed in the apartment with handcuffed Kirk and Cook for over two hours while the officer in charge, John Brunet, went to get a search warrant, using some of the information they obtained during their entry.

Officer John Brunet and his partner, Derek Brumfield, along with four to six back up officers, including Steven Gaudet, went to the 2300 block of Washington Avenue that day, March 5, 1998, around 5:00 p.m. It was daylight. They had received anonymous information from a hotline about drug trafficking from the twenty apartment building, but had no pa. .cular information about Apartment 15 and did not know either Kirk or Cook. The officers' testimony, though they were working together and had the same vantage point, was inconsistent.

Over two hours into the surveillance, between 7:15 and 8:00 p.m., Brunet saw what he believed to be four drug transactions at the door of Apartment 15. Kirk was the person at the door in one of the first three alleged transactions. Cook was seen at the door making a suspected fourth transaction to a man, later identified as Leslie Butler. Officer Brumfield[1], who was with Brunet in a car about forty yards from the apartment during the surveillance, did not see any transactions.

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[1]Only Officer Brunet testified at the hearing on the motion to suppress the evidence. Officers Brunet, Brumfield and Gaudet testified at trial to the circumstances of the search, seizures and arrest. Under Louisiana law, in reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at the hearing on the motion to suppress; it may also consider any pertinent evidence given at trial of the case. State v. Nogess, 98-0670, (La.App. 4 Cir. 3/3/99), 729 So.2d 132, 137; State v. Dorsey 99-1819 (La.App. 4 Cir. 4/19/00), 763 So.2d 21; State v. Carter 94-2859 (La. 11/27/95), 664 So.2d 367.

Brumfield could not see the apartment clearly. Brunet testified that they were so close that he did not need binoculars to see the alleged exchanges of small unknown objects for currency.

At Brunet's direction, Officer Gaudet stopped and arrested Butler at 8:15 p.m., around the corner from the apartment, on LaSalle Street and Washington Avenue (*See* diagram, App. 5; Trial Tr. 21-3). Gaudet seized cocaine from Butler and arrested him. Then Gaudet met Brunet, Brumfield, and other officers at Kirk's apartment. Paul Cook saw Officers Brunet and Brumfield at his door and came outside, but the officers pushed past him and took him inside the apartment. Brunet and Gaudet's estimate of the number of officers involved in the entry varied from six to eight officers. Gaudet and Brunet said that Brumfield participated in the initial entry of the tiny apartment. Brumfield denied entering the apartment until Brunet returned with the warrant at 10:30 p.m. Brumfield would not admit that the other officers entered the apartment.

Brunet claimed that he had an "exigent circumstance" to justify the police actions in that he believed evidence would be destroyed because he thought Butler's detention "would get back to them" (App. 3, Mot. Tr. 13). Brunet said it was "possible" that evidence would be destroyed (Trial Tr. 6). Brunet candidly admitted, "no judge or magistrate would have signed a warrant" before the police entered the apartment (Trial Tr. 21). Brunet admitted that he put information gained in the entry of the apartment in the warrant application (Mot. Tr. 11, App. 3; Warrant, App. 4).

Brunet returned with the search warrant at 10:40 p.m. He admitted that by then, "several items had already been seized" (Trial Tr. 7). After securing the warrant, $283.00 was seized from the pants of Kennedy Kirk. The officers also seized a pipe, a cooking tube, and some mail showing that both Kirk and Cook received mail or lived at the apartment. John Palm, an expert in drug analysis, tested four pieces from each vial and found them positive for cocaine. There was residue

found on some, but not all, of the other items seized from the apartment. All of these items, including the cocaine found on Cook. were admitted as evidence against Kirk.

The trial court's denial of the Motion to Suppress was upheld by the Louisiana Fourth Circuit Court of Appeal. (*See* App. 2). Four judges of the Louisiana Supreme Court denied review, while three judges voted to grant certiorari. One of the dissenters provided written reasons, citing the Fourth Amendment violation:

> "I dissent from the majority's denial of this writ because I believe the lower courts erroneously denied the defendant's motion to suppress. The Fourth Amendment to the United States constitution has drawn a firm line at the entrance to the home, and thus, the police need both probable cause to either arrest or search and exigent circumstances to justify a nonconsensual warrantless intrusion into private premises. State v. Welch, 449 So.2d 468, 470 (La.1984). Pursuant to La.Code Crim. Proc. art. 703, the state has the burden of proof on the admissibility of evidence seized without a warrant. Here, the defendant was arrested inside an apartment, without a warrant, and the state has not demonstrated that exigent circumstances were present. Consequently, defendant's arrest was unconstitutional, and his motion to suppress should have been granted." State of Louisiana v. Kennedy Kirk 2000-3395 (La. 11/9/01), 801 So.2d 1063 (*See* App. 1).

FEDERAL ISSUES RAISED IN LOWER COURTS

The Motion to Suppress the Evidence, based on the Fourth Amendment violation, was denied in the trial court and the Louisiana Fourth Circuit Court of Appeal affirmed that decision. Kennedy Kirk's Application for Writ of Certiorari to the Louisiana Supreme Court raised the unconstitutionality of the warrantless search and seizure of Kennedy Kirk's apartment and person as prohibited by the Fourth Amendment to the United States Constitution and applied to the states under the due process clause. Kennedy Kirk's Application for Writ of Certiorari to the Louisiana Supreme Court raised the conflict with this Court's decisions in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed.2d 153 (1948); Minnesota v. Dickerson, 508 U.S. 366, 113 S. Ct. 2130, 124 L.Ed.2d 334

(1993); Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); Segura v. United States, 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984); Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984); Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970); and Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

The Louisiana Supreme Court, in a four to three decision, should have granted review and corrected the erroneous decision of a lower appellate court which permitted police to enter a private residence without either a warrant or an exigency, and then to search the person of the defendant. A warrantless entry, seizure and search of the Kirk's apartment, its occupants and its contents contaminated the seizure of evidence, including that obtained after the warrant was issued. Moreover, all of the evidence improperly seized, including that from the other occupant and the apartment, not just the evidence seized from Kirk's person, was used against Kirk at trial.[2]

SPECIAL AND IMPORTANT REASONS CERTIORARI SHOULD BE GRANTED: COMPLIANCE WITH U.S. SUPREME COURT RULE 10

This case presents the issue, avoided in Payton v. New York, 445 U.S. 573, 601, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980) and not reached in Welsh, 466 U.S. 740 or Illinois v. McArthur 531 U.S.326, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001), "to consider the sort of emergency or exigent situation that would justify a warrantless entry into a home for the purpose of either arrest or search." Payton, 445 U.S. at 583, 100 S.Ct. at 1378.

The three dissenters on the Louisiana Supreme Court were correct in declaring that the New Orleans Police Department violated the Fourth Amendment to the United States Constitution's "firm

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[2]Louisiana law applies the Fourth Amendment to evidence illegally seized from a person other than the defendant if the evidence is to be used against the defendant. State v. Slan 624 So.2d 451 (La. 4 Cir. 1993), reversed 632 So.2d 749 (La. 1993).

line at the entrance to the home" when six officers forcibly entered Kennedy Kirk's apartment without a warrant after a three hour surveillance and held Kirk and his co-defendant inside while one of the officers went to apply for a warrant. State of Louisiana v. Kennedy Kirk 2000-3395 (La. 11/9/01), 801 So.2d 1063 (*See* App. 1). The four judge majority of the Louisiana Supreme Court was incorrect in letting stand the lower appellate court's decision where the lower court found that probable cause to make a warrantless arrest of Kirk and his co-defendant, who were inside their apartment, created an exception to the search warrant requirement to enter, seize them, and search them.

An officer's speculation that evidence might be destroyed if persons in the apartment learned of the officers' presence is insufficient to prove an exigency or justify an exception to the warrant requirement, where there is no evidence that the occupants knew the police were in the area until the officers approached their door and forced entry. Under these circumstances, this Court's long-standing decisions (see cases cited supra, pp. 6-7) which draw a "firm line at the entrance to the home" should not be expanded and perverted to allow officers, after a three hour surveillance, to enter an apartment and hold suspects inside a home without a warrant while another officer applies for a warrant using some of the information the officers acquired during the entry.

ILLEGALITY OF THE WARRANTLESS SEARCH AND SEIZURE
ARGUMENT IN SUPPORT

The surveillance of the twenty unit apartment building on Washington Avenue in New Orleans, based on anonymous information from a hotline tip, started around 5:00 p.m. The officers did not know Kennedy Kirk and did not have a specific apartment targeted. Between 7:15 and 8:00 p.m., four people went to the door of Apartment 15, had brief exchanges, and left. The police stopped the last one of the four, Leslie Butler, after Butler walked a block away and around the

corner. Butler was arrested for cocaine possession. At 8:15 p.m., six New Orleans Police Officers went directly to Apartment 15 where they grabbed Paul Cook, who had stepped outside when he saw them at the door. The officers pushed Cook inside and entered without a warrant of any kind. Kennedy Kirk was inside.

Officer Brunet accurately admitted that "no magistrate or judge would have signed a warrant" up to that point (Trial Tr. 21). The officers searched Kirk, finding a plastic medicine vial with fifty-six rocks of cocaine in his underwear. A similar vial was found on Cook and a gun was found in the chair where Cook was seated. The officers used information gained in the entry, including Kirk's identity, in the warrant application (*See* Warrant, App. 4; Mot. Tr.11, App. 3). Kirk and Cook were handcuffed and held by six officers inside the apartment for over two hours. The warrant was signed at 10:39 p.m. and executed at 10:40 p.m.(*See* Warrant, App. 4). Brunet admitted most of the evidence had been seized by then (Trial Tr. 7). After the warrant was obtained, money was seized from Kirk while mail and paraphernalia were seized from the apartment. After his Motion to Suppress the Evidence was denied, the items seized before and after the warrant were used at trial against Kirk.

The officers attempted to justify their actions on their baseless speculation that evidence would be destroyed if the apartment occupants learned that Butler had been arrested (Mot. Tr. 13, App. 3; Warrant, App. 4). There was no evidence that the apartment's occupants had any inkling of the surveillance or the police presence until the officers burst through the door. There was no evidence that the location of Butler's arrest could be seen from the apartment (*See* diagram, App. 5). There was no evidence that Butler was to return to the apartment so that his absence might be missed. There was no evidence that any known associate of Kirk had observed Butler's arrest.

A majority of the Louisiana Supreme Court let stand a ruling of the Louisiana Fourth Circuit Court of Appeal that disregarded the warrantless entry of the private residence because the vial of cocaine was found on the person of Kennedy Kirk, rather than being removed from elsewhere in the apartment. The lower appellate court purposely avoided the "long argument that there were not exigent circumstances for entering the apartment without a warrant" *See* App. 2, p. 3, State v. Kirk 2000-KA-0190, 773 So.2d 259 (La. 4 Cir. 11/15/2000). The dissenters on the Louisiana Supreme Court found that the State had not proven the existence of an exigency. *See* App. 1, State of Louisiana v. Kennedy Kirk 2000-3395 (La. 11/9/01), 801 So.2d 1063.

The seizure and search of Kennedy Kirk's body inside his apartment, the search of his companion and his apartment violated the Fourth Amendment in these aspects: The officer admitted that "no magistrate or judge would have signed a warrant" on the information he had before they burst in. The officers made an investigatory stop inside the apartment without a warrant. The officers made a warrantless entry and seizure of the apartment and its occupants. The officers claim of an exigency based on the "possible" destruction of evidence is generalized, speculative, and not supported by the facts. There was no valid 'search incident to arrest' exception as found by the lower court where the officers said Kirk had not been arrested when the incriminating evidence was seized and the entry to make the arrest was illegal. Moreover, the warrantless entry of the apartment and search of Kennedy Kirk that occurred in this case was unreasonable.

Constitutional Protection of Persons in their Homes

While the Louisiana Court of Appeal correctly stated that the cocaine was seized from the person of Kennedy Kirk, the lower appellate court missed a primary fact: Kennedy Kirk was inside his private residence when it was entered without a warrant and he was seized. The police cannot

conduct an investigatory stop inside a home without a warrant. Kirk was handcuffed and held inside the apartment by six officers for hours. His body was searched and a vial of cocaine was found in his underwear. It is not as if the seizure and search of Kennedy Kirk was on a street corner where the expectation of privacy, and coinciding constitutional protection, is significantly lessened.

This Court has long-recognized principles regarding the sanctity of the home, resulting in the decision in Payton, 445 U.S. 573, ,which held that warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances. Where the lower appellate court specifically avoided the "long argument that there were not exigent circumstances for entering the apartment without a warrant" *See* App. 2, p.3, Kirk, 773 So.2d 259, the majority of the Louisiana Supreme Court erred in denying review of the decision (*See* App. 1).

The chief evil against which the Fourth Amendment is directed is warrantless entry and search of a home United States v. United States Dist. Court for Eastern Dist. of Mich., 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972); Payton, 445 U.S. at 585, 100 S.Ct. 1371; McArthur 531 U.S.326. Principled respect for the sanctity of the home has been upheld in many U.S. Supreme Court decisions dealing with Fourth Amendment jurisprudence:

> The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home"; Payton v. New York, 445 U.S. 573, 601, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980): emphasizing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"; Mincey v. Arizona, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978): "[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law. Wilson v. Layne, 526 U.S. 603, 610, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999).

A principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the

home for purposes of search or arrest. *See* Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948). "[S]earches and seizures inside a home without a warrant are presumptively unreasonable." Payton, 445 U.S. at 586, 100 S.Ct. at 1380; Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576.[3]

In Welsh v. Wisconsin, 466 U.S. 740, the Court held that a warrantless, nighttime entry into home to arrest an individual for driving while under the influence of an intoxicant was prohibited by the Fourth Amendment. The Court considered the warrantless arrest in the home, not the warrantless search of the home. The Court upheld its earlier decision in Payton, 445 U.S. 573. In Payton, the Court explicitly refused "to consider the sort of emergency or exigent situation that would justify a warrantless entry into a home for the purpose of either arrest or search." Id., at 583. In Welsh, the Court found that warrantless entry of a home to arrest Welsh for driving while intoxicated was not such an exigency, despite probable cause for the arrest.

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[3]*See* also Coolidge v. New Hampshire, 403 U.S. 443, 481, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564; Vale, 399 U.S. at 34, 90 S.Ct. at 1971; Trupiano v. United States, 334 U.S. 699, 705, 68 S.Ct. 1229, 1232, 92 L.Ed. 1663 (1948); Michigan v. Clifford, 464 U.S. 287, 296-297, 104 S.Ct. 641, 646, 78 L.Ed.2d 477 (1984) (plurality opinion); Steagald v. United States, 451 U.S. 204, 211-212, 101 S.Ct. 1642, 1647-1648, 68 L.Ed.2d 38 (1981); McDonald, 335 U.S. at 456, 69 S.Ct. at193; Johnson, 333 U.S. at 13-15, 68 S.Ct., at 368-370; Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886); Minnesota v. Carter, 525 U.S. 83, 119 S.Ct. 469, 142 L.Ed.2d 373 (1998); Oystead v. Shed, 13 Mass. 520 (1816); Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961); Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968);United States v. Karo, 468 U.S. 705, 714, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984) ("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant .... Our cases have not deviated from this basic Fourth Amendment principle."); Payton, 445 U.S. 573,("The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home.") Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.")

The first requirement for the search and seizure of an apartment and its occupants is that the officers have probable ;ause. The 'probable cause' requirement is indispensable under any circumstances. The second requirement for the search and seizure of a dwelling and its occupants is that the officers have a warrant. The warrant requirement is dispensable if the State can prove that there were exigent circumstances that prevented police from applying for a warrant. Probable cause exists when "the facts and circumstances within the affiant's knowledge, and those of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that evidence or contraband may be found at the place to be searched." State v. Duncan, 420 So.2d 1105, 1108 (La.1982).

Probable cause for the arrest or entry was not challenged in Welsh. In the case at bar, the Louisiana Fourth Circuit Court of Appeal found probable cause for Kirk's arrest despite Officer Brunet's acknowledgment that he did not have probable cause for the entry (Trial Tr. 21). For purposes of this writ application, the focus is not on whether the officers had probable cause either to enter or arrest Kirk. The issue for the Court in this writ application is the question left unaddressed in Payton: whether the officers had the sort of emergency or exigent situation that would justify their warrantless entry into Kirk's home for the purpose of either arrest or search. The three dissenting judges on the Louisiana Supreme Court found insufficient proof of an exigency (App. 1).

The majority of the Louisiana Supreme Court let stand the lower court's finding that probable cause for Kirk's arrest inside the apartment subverted the warrant requirement. The lower court found that the existence of probable cause rendered noncompliance with the warrant procedure an irrelevance. This finding is contrary to this Court's statement in Agnello v. United States, 269 U.S. 20, 33, 46 S.Ct. 4, 70 L.Ed. 145 (1925) and Payton, 445 U.S. 573. In Payton, the constitutionality

of New York statutes that authorized police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest were challenged. The Court remarked on,

> [T]he long-settled premise that, absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within. The constitutional protection afforded to the individual's interest in the privacy of his own home is equally applicable to a warrantless entry for the purpose of arresting a resident of the house; for it is inherent in such an entry that a search for the suspect may be required before he can be apprehended. An entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection. *Id.*, at 587-588.

Since the Payton decision, arrests in a suspect's home have required a warrant, distinguishing them from warrantless arrests in a public place. The lower courts in Louisiana erred in refusing to make that distinction in this case.

The Court in Coolidge, 443 U.S. at 468 (citations omitted), reaffirmed the principle that

> [N]o amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances. Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

In Johnson, Justice Jackson eloquently explained the warrant requirement in the context of a home search:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.... The right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and

> freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent. 333 U.S., at 13-14, 68 S.Ct., at 369.

Kennedy Kirk was inside his apartment at the time the police entered with neither a search warrant or an arrest warrant. His warrantless arrest in his apartment, regardless of probable cause, required a warrant issued by a neutral magistrate or a proven exigent circumstance. The decision by the lower courts in Louisiana is wholly incorrect in that probable cause to arrest cannot subvert the primary purpose of the Fourth Amendment.

In Kyllo v. United States, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001), the Supreme Court considered whether use of heat sensing technology to detect marijuana growth for distribution was a "search" of the private interior of a home, thus requiring both probable cause and a warrant. In the case at bar, the officers went further in their intrusion, and used physical force, not technology to invade Kirk's apartment. Then they applied for a warrant using some of the information they acquired from the warrantless entry (Mot. Tr. 11, App. 3; Warrant, App. 4). Their illegal entry also was a 'search' under the Kyllo definition:

> In Silverman, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, 365 U.S., at 512, 81 S.Ct. 679, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes. *Id.*, 121 S.Ct. at 2045.

One of the three dissenting judges of the Louisiana Supreme Court in the case at bar quoted, without citing, a passage from Payton that this Court also cited in Kyllo,

> [T]he Fourth Amendment draws "**a firm line at the entrance to the house**," Payton, 445 U.S., at 590, 100 S.Ct. 1371. That line, we think, must be not only firm but also

> bright--which requires clear specification of those methods of surveillance that require a warrant." (emphasis added)(*See* App. 1).

Despite the diversity of opinions in Kyllo, all members of the Court agreed with the continued sanctity of the privacy of the home.

The decision in Trupiano 334 U.S. 699, has been reconsidered several times, but never entirely overruled. In discussing the difference between warrantless police action and police action under the authority of a warrant, the Court in Trupiano stated,

> A search warrant must describe with particularity the place to be searched and the things to be seized. Without such a warrant, however, officers are free to determine for themselves the extent of their search and the precise objects to be seized. This is no small difference. It is a difference upon which depends much of the potency of the right of privacy. And it is a difference that must be preserved even where contraband articles are seized in connection with a valid arrest. *Id.*, at 710.

When the six officers entered Kennedy Kirk's apartment, they had not determined who or what would be the subject of their search. They had conducted only a three hour surveillance, initiated by non-specific, anonymous information pertaining to the entire twenty unit apartment building. They knew nothing of Apartment 15 or its occupants. Their observations of suspected drug transactions at the door of Apartment 15 might have been enough to apply for a warrant, but even Officer Brunet admitted at that point, "no judge or magistrate would have signed a warrant" (Trial Tr. 21). Their entry was to make an impermissible investigatory stop. Clearly, the officers' entry was an illegal search to gain information for the warrant application. It cannot be condoned.

Warrantless Entry Requires Recognized Exigency

In McDonald, 335 U.S. 451, the Court held that a search without a warrant demands exceptional circumstances which must be obvious. The most basic constitutional rule in this area, as found in Coolidge, supra, is that:

> [S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption * * * that the exigencies of the situation made that course imperative.' (T)he burden is on those seeking the exemption to show the need for it. 403 U.S. at 481.

See also State v. Welch, 449 So.2d 468 (La. 1984), as cited by the dissenting judge of the Louisiana Supreme Court in this case. *See* App. 1.

Exigent circumstances are exceptional circumstances which, when coupled with probable cause, justify an entry into a "protected" area that without those exceptional circumstances would be unlawful. The exceptions are few in number and well delineated in order to protect an individual's right to be free from governmental interference. United States v. United States District Court, 407 U.S. at 318, 92 S.Ct. at 2137; Thompson 469 U.S. 17. Indeed, the Court has recognized only a few such emergency conditions.[4] The Court has actually applied only the "hot pursuit" doctrine to arrests in the home. *See* Santana, 427 U.S. at 42-3. Additionally, the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Vale, 399 U.S. at 35; State v. Hathaway, 411 So.2d 1074, 1079 (La. 1982); Welch, 449 So.2d at 470.

In the case at bar, Officer Brunet admitted that he did not have the initial probable cause sufficient for obtaining the warrant until after the illegal entry had been made (Trial Tr.21). In effect, he conducted an investigatory stop inside the home. The lack of an exigency would not be the

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[4]*See*, e.g., United States v. Santana, 427 U.S. 38, 42-43, 96 S.Ct. 2406, 2409-2410, 49 L.Ed.2d 300 (1976) (hot pursuit of a fleeing felon); Warden v. Hayden, 387 U.S. 294, 298-299, 87 S.Ct. 1642, 1645-1646, 18 L.Ed.2d 782 (1967) (same); Schmerber v. California, 384 U.S. 757, 770-771, 86 S.Ct. 1826, 1835-1836, 16 L.Ed.2d 908 (1966) (destruction of blood evidence); Michigan v. Tyler, 436 U.S. 499, 509, 98 S.Ct. 1942, 1949, 56 L.Ed.2d 486 (1978) (ongoing fire).

primary illegality of the officers' action[5]. Nonetheless, this petition will consider whether there is an established exigent circumstance in this case that would justify Brunet's intrusion into Kirk's apartment.

In McDonald, 335 U.S. 451, the officers conducted a surveillance of a suspected numbers operation for several months. On the day of the arrest three police officers surrounded the boarding house where McDonald had a room. They did not have a warrant for arrest nor did they have a search warrant. One of the officers thought that he heard an adding machine, frequently used in a numbers operation. Believing that the numbers game was in progress, the officers demanded entry after observing McDonald and the operation through a transom. McDonald and others in the room were arrested and the contents of the room were seized.

In McDonald, the prosecution failed in its attempt to build the lawfulness of the search on the lawfulness of the arrest and therefore justify the search and seizure without a warrant. *Id.* Likewise, the Louisiana lower court's attempt to justify the officers' illegal entry of Kirk's apartment with the circumstance of Kirk's 'lawful' arrest, falls short. The Court in McDonald said,

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the

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[5]Similarly, in Coolidge, the Court noted,

> With respect to searches and seizures carried out on a suspect's premises, the conflict has been over the question of what qualifies as an 'exigent circumstance.' It might appear that the difficult inquiry would be when it is that the police can enter upon a person's property to seize his 'person ... papers, and effects,' without prior judicial approval. The question of the scope of search and seizure once the police are on the premises would appear to be subsidiary to the basic issue of when intrusion is permissible. But the law has not developed in this fashion. 403 U.S. at 443.

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In Kirk's case, there was no arrest warrant and no search warrant. The officers testified that there was no "search" and the occupants were not arrested until Officer Brunet returned with the search warrant (Mot. Tr. 2, App. 3). The officers testified that they entered the apartment, seized the occupants and conducted a "frisk" for weapons for their safety (Mot. Tr. 5,14-5, App. 3). The small medicine bottle taken from Kirk's underwear and opened to reveal rocks of cocaine could not have been mistaken for a weapon. Thus, the Court of Appeal's conclusion that the search was justified as "incident to arrest" is not supported by the evidence.

In the companion case decided with Payton, 445 U.S. 573, four officers went to Riddick's address without a warrant for the arrest of Riddick for armed robbery. Riddick's young son opened the door and the officers entered the house and placed him under arrest while he sat in bed. Before permitting him to dress, they opened a chest of drawers two feet from the bed in search of weapons and found narcotics and related paraphernalia. Riddick was subsequently indicted on narcotics charges. In Riddick, (*See* Payton 445 U.S. 573), the lower courts upheld the search as incident to arrest under Chimel, 395 U.S. 752. The lower appellate court in Louisiana made the same erroneous finding in the instant case. This Court reversed in Riddick, and should reverse again in the case at bar.

Similarly, the "plain view" exception to the warrant requirement does not apply. The key prerequisite to the "plain view" exception to the warrant requirement is that the police have a right to be where they were when they inadvertently observed the articles. Further, the seized articles also must clearly be contraband when they first appeared in the officer's "plain view". State v. Landry, 414 So.2d 674 (La. 1982). None of these prerequisites were met under the circumstances of this case, as the officers did not have a right to enter the apartment and seize Kennedy Kirk without a

warrant. The evidence seized from Kennedy Kirk was seized from his person and was not in plain view. The medicine bottle was not obviously contraband.

In Trupiano, 334 U.S. 699, the agents' entry on to the farm to find an illegal alcohol enterprise was with the consent and in the accompany of Kell, the lessor, thus the Court found that the arrest of the defendant was lawful as he was committing a felony in the agents' presence, but the Court refused to find that all of the agents' subsequent actions were incident to that arrest and justified by the plain view exception. In Trupiano, the Court found no excuse for the failure of the agents to obtain a warrant before entering the property, and that the mere fact that a suspect was arrested in the proximity of the still provided no 'exigent circumstance' to validate a warrantless seizure. *Id.* The scope of the intrusion was limited to that necessary to make the valid arrest. The fact that at the time of the arrest the still was in plain view and nearby was therefore irrelevant.

It is significant to note that in the case at bar, the officers did not claim either the 'search incident to arrest' or 'plain view' exception. The lower court came up with these exceptions on its own. The 'search incident to arrest' and 'plain view' exceptions are not panaceas to justify an illegal search after the fact. Briefly addressing the other recognized exigencies, there was no evidence to indicate that the officers were in hot pursuit of anyone who had entered the apartment. They had safely stopped Butler, a mere visitor to the apartment, who had not been inside. Butler was stopped at a safe distance and out of the view of the apartment (*See* diagram, App. 5). The officers did not know who was in the apartment or whether there were still drugs in the apartment. They clearly entered the apartment to seize it, its occupants, and its contents, whatever and whoever they might be. They gave no reason why the surveillance could not have been maintained while a search warrant

was obtained, during which time any occupants who left could have been "taken down" at a distance from the apartment.

In Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), the Court rejected a "murder scene exception" to the warrant requirement, but approved a cursory check for additional victims. The Mincey decision reaffirmed that "A warrantless search must be "strictly circumscribed by the exigencies which justify its initiation." *Id.*, citing Terry v. Ohio, 392 U.S. 1, 25-26, 88 S.Ct., at 1882, 20 L.Ed.2d 889 (1968). The Court in Mincey found that even the "vital public interest in the prompt investigation of an extremely serious crime [or the] mere fact that law enforcement may be made more efficient" could not vitiate the warrant requirement. *Id.*

In Vale 399 U.S. 30, the Court held that absent a demonstrable threat of imminent destruction of evidence, the authorities may not enter a residence in order to preserve that evidence without a warrant.[6] In Vale, the officers had two arrest warrants for Vale, who was believed to be residing at a specified address. During a surveillance, they observed Vale come out of the house and make an exchange with the driver of a car, a known narcotic addict. They arrested Vale and the driver. The officers informed Vale they were going to search the house, took him inside, made a cursory inspection of the house to ascertain if anyone else was present, then searched a rear bedroom, revealing a quantity of narcotics. The Louisiana Supreme Court held that the search of the house did not violate the Fourth Amendment because it occurred 'in the immediate vicinity of the arrest' and was 'substantially contemporaneous therewith'. *Id.* In the case at bar, despite this Court's holding

[6] *See* also United States v. Jeffers, 342 U.S. 48, 51-52, 72 S.Ct. 93, 95-96, 96 L.Ed. 59 (1951); McDonald, 335 U.S. at 454-455, 69 S.Ct. at192-193; Johnson 333 U.S. at 13-15, 68 S.Ct. at 368-370.

in Vale, the majority of the Louisiana Supreme Court erroneously let stand the same reasoning by the lower appellate court in this very similar situation.

Writing in concurrence in McDonald, Justice Jackson explained why a finding of exigent circumstances to justify a warrantless home entry should be severely restricted:

> When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant. 335 U.S. at 459-460, 69 S.Ct. at 195-196.

The only exigency offered by Officer Brunet for their intrusion into Kennedy Kirk's apartment without a warrant was Brunet's conjecture as to the possible destruction of evidence. There is nothing in the law that allows the officers to create, concoct, or speculate an emergency situation to avoid the warrant requirement. Officer Brunet's generalization that because drugs were suspected of being in the apartment, they might be destroyed if the occupants learned of the police presence is too far removed and not strictly circumscribed so as to create an exigency for his illegal, warrantless entry. The State's lack of proof of the 'destruction of evidence' exigency, as noted by the dissent in the Louisiana Supreme Court is discussed hereinafter (*See* App. 1).

There is no exception that allows officers to seize an apartment or residence while they apply for a warrant to search the apartment without probable cause or without one of the recognized exigencies.[7] Where a person is seized inside a residence after warrantless, illegal entry, no exception legitimizes the seizure of evidence simply because it is found directly on a person. The Louisiana Fourth Circuit Court of Appeal erred in finding a new "personal property" exception to the warrant

[7] Unfortunately, the police practice in this case is not an anomaly in New Orleans. An application for review is currently pending in the Louisiana Supreme Court for a warrantless search and seizure under nearly identical circumstances. *See State v. McCoy et al.* Louisiana Supreme Court No. 2001-K-1027, filed April 11, 2001, still pending.

requirement and affirming the trial court's denial of the Motion to Suppress the Evidence. The majority of the Louisiana Supreme Court erred in letting the lower court's decision stand, without review. This Application for Writ must be granted.

Officers Lacked Reasonable Belief that Possible Destruction of Evidence Existed

Under the circumstances presented by Officer Brunet, there was no probable cause to believe that the evidence in the Washington Avenue apartment was at risk of destruction. The police officers' belief that their stop of Butler in front of the restaurant around the corner might have alerted the occupants of the apartment that police were in the neighborhood is too tenuous to support the warrantless entry and seizure. The information obtained in the brief surveillance of the apartment in the case at bar cannot support the officers conclusions. The officers had no information as to the number of occupants in the apartment, the nature of the operation, or even if there was more evidence in the apartment that could be subject to destruction.

In the search warrant application, Brunet explained the seizure of the apartment: "The detectives immediately secured the apartment do (sic) to the exigent circumstance, based on the amount of foot traffic in the area, and believing that word of the arrest would get back to the occupants of the apartment, and vital evidence would be destroyed." *See* App. 4. The surveillance vehicle was forty yards from the apartment for three hours, apparently without fear of detection and without having an effect on the neighborhood activities, despite the 'amount of foot traffic'. There was no evidence that anyone was acting as a 'look out'. There was no evidence that Butler's arrest caused a disturbance. There is no evidence that the occupants of the apartment knew that Butler was arrested or the police were in the neighborhood. There is no evidence that Butler tried to alert the occupants of the apartment that t poe were in the neighborhood. As the burden was on the State to

show that the exigency makes the seizure 'imperative', the officers should have provided any factual evidence for their conclusion that the evidence might be destroyed.

Police officers are allowed to enter dwellings and seize them where there is proof of imminent danger of destruction of evidence. Vale, 399 U.S. 30. In this case, the State's evidence did not justify the warrantless search where only a generalized **"possibility"** of destruction of evidence was claimed by Officer Brunet. The State did not prove the 'destruction of evidence" exigency (*See* App. 1, Kirk 801 So.2d 1063). To validate the invasion of the sanctity of the home and overcome the presumption of unreasonableness that attaches to all warrantless home entries, the burden of proof was on the State to show that there was an exigent circumstance and particular need. Vale, 399 U.S.at 34; State v. Thompson 466 So.2d 39 (La. 1985), *on remand* Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984), 448 So.2d 666 (La.1984); Payton 445 U.S., at 586, 100 S.Ct., at 1380.

In the instant case, the State did not meet its burden of proving an exigency that justified the warrantless entry of the apartment and seizure of Kennedy Kirk. There is no exception that allows officers to seize an apartment or residence while they apply for a warrant to search the apartment because it is expedient. The officer's claim of risk of destruction of evidence was not established, as noted by the dissent to the Louisiana Supreme Court's denial of review:

> Pursuant to La.Code Crim. Proc. art. 703, the state has the burden of proof on the admissibility of evidence seized without a warrant. Here, the defendant was arrested inside an apartment, without a warrant, and the state has not demonstrated that exigent circumstances were present. Consequently, defendant's arrest was unconstitutional, and his motion to suppress should have been granted. *See* App. 1.

Contrary to the Louisiana Court of Appeal's conclusion that the search was permissible as "incident to arrest", which was let stand by the majority of the Louisiana Supreme Court, the officers

did not testify that Kennedy Kirk was arrested before he was searched. Instead, they claimed that their warrantless acts were based on a fear that evidence would be destroyed. This exigency, however, is not supported by the evidence. The officers did not know that there was evidence in the apartment. Also, the officers did not know that anyone in the apartment had a means of learning of the "takedown". To use the exigent circumstance alleged by the officers, where they would be allowed to enter into dwellings without a warrant for the purpose of arrest or seizure, the circumstances must show: lack of sufficient time to prepare an affidavit and locate a magistrate to obtain warrant after probable cause arises; imminent danger of destruction of evidence; and the possibility of escape. Welch 449 So.2d at 470; App. 1, Kirk 801 So.2d 1063, *dissent*.

The State's evidence did not prove the officers' claimed fear of destruction of evidence was reasonable or that any of the other exigencies existed. Though Officer Brunet gave his generalized belief that evidence might be destroyed, he provided no facts that would have put the apartment occupant on alert that the apartment was under police scrutiny. The officer did not explain why or how he thought the people in the apartment would come by information about the arrest of Butler, one of the suspected buyers. Accordingly, the search and seizure of Kennedy Kirk and his apartment were conducted unlawfully.

In United States v. Rubin, 474 F.2d 262 (3rd Cir. 1974) *cert. denied*, 414 U.S. 833, 94 S.Ct. 173, 38 L.Ed.2d 68 (1973), the court listed circumstances which might lead police officers to reasonably conclude that evidence would be destroyed or removed before they could secure a search warrant:

> 1) The degree of urgency involved and the amount of time necessary to obtain a warrant;
> 2) Reasonable belief that the contraband is about to be removed;

> 3) The possibility of danger to police officers guarding the site of the contraband while a search warrant is sought;
> 4) Information indicating the possessors of the contraband were aware that the police were on their trail; and
> 5) The ready destruction of the contraband and the knowledge and efforts to dispose of narcotics and escape are characteristic behavior of persons engaged in narcotics traffic. *Id.*, at 268-9 (citations omitted).

Further, the police officer subjective beliefs must be supported by the evidence. *See* United States v. Thompson, 700 F.2d 944 (5th Cir.1983) and United States v. Scheffer, 463 F.2d 567 (5th Cir.1972), *cert. denied* 409 U.S. 984, 93 S.Ct. 324, 34 L.Ed.2d 248 (1972).

Applying the Rubin factors to the State's case against Kennedy Kirk, the 'destruction of evidence' exigency was not established. First, there appeared to be no urgency in the officers' actions. They started the surveillance at daylight, around 5:00 p.m. (Tr. 2,18-20). They entered the apartment around 8:15 p.m. They did not apply for the warrant until 10:30 p.m. (Tr.18-20,51-4). There is no evidence that the officers had a reasonable belief that the contraband was about to be removed. It was supposition on their part. They did not testify that they were in any danger in watching the apartment. Indeed, they said they were within a very short distance to the door. There was no evidence that the occupants of the apartment knew or had any way of knowing about the surveillance. Lastly, the officers described only one means of entry or exit from the small apartment so that destruction or escape without detection by the surveilling officers would have been impossible. Officer Brunet's testimony does not establish the exigency that made the illegal entry and seizure "imperative".

In Wilson v. Arkansas, 514 U.S. 927, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995), the Court expanded on Richards v. Wisconsin, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997), where the Court held that the Fourth Amendment does not permit a blanket exception to knock-and-

announce requirement for felony drug investigations based on a bald assertion of the possible destruction of drugs. The Court required a case by case analysis of the reasonableness of the officers' decision not to knock. The Court held that "[i]n order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime." *Id.* at 394.

In Richards, the Court warned against the "overgeneralization" of risks for the purpose of alleviating the officers' duty to act within constitutional parameters. The Court suggested that where risks and exigencies could be lessened by another investigatory method, that route should be taken. *Id.* at n. 4. The Court held that the police are required to announce their presence in the execution of a warrant, *unless* the police establish a compelling reason not to make their presence known.

The importance of the no-knock cases to the issue before the Court in the instant case is beyond question. Generalized exceptions to the "knock" rule in narcotics cases were rejected in both Richards and Wilson. The Richards and Wilson decisions show then, that in warrantless searches or seizures, the officers must have similarly compelling reasons, not just the general fact that narcotics may be involved, to claim the "destruction of evidence" exigency. *Id.* Thus, this Application for Writ should be granted.

Turning to our case, Brunet and the other police officers created the exigency by deliberately having Butler, the alleged buyer, stopped within one hundred yards of the apartment. There was no evidence as to why the surveillance of the apartment could not have been maintained until the search warrant was obtained. There was no testimony about the time it would take to get a warrant. Instead, the officers set up a "take down" of Butler and a contemporaneous warrantless entry of Kirk's

apartment. There was no evidence that the site of Butler's arrest was observable from the apartment. Without any indication that the occupants had any means of learning of Butler's arrest, the police officers went to the door of the apartment and made a forced entry. They seized Kirk, items on his person, and items in the apartment. This deliberate action was violative of the Fourth Amendment. The Louisiana lower court erred in ignoring the illegality of the officers' acts and their taint on the later search of Kennedy Kirk's personal effects.

In United States v. Capote-Capote, 946 F.2d 1100 (5th Cir. 1991), *cert. denied* 504 U.S. 942, 112 S.Ct. 2278, 119 L.Ed.2d 204 (1992), an undercover sale went awry and justified the officers' entry and seizure for the protection of the undercover participants. In the instant case, the operation went exactly as planned, including the "take down" of Butler as planned by the officers. There was no testimony that anyone in the apartment had any knowledge of the takedown. The officers' speculation was not supported by the evidence. Their claimed exigency was too far removed from fact and speculative to support the warrantless entry of the apartment.

The Court considered the issue of warrantless entry of a residence in Segura, 468 U.S. 796. In Segura, the Court held that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents but at the same time, the Court reaffirmed that, **"absent exigent circumstances, a warrantless search--such as that invalidated in Vale v. Louisiana, 399 U.S. 30, 33-34, 90 S.Ct. 1969, 1971-1972, 26 L.Ed.2d 409 (1970)--is illegal."** *Id.* at 810 (emphasis added).

In Segura, unlike the case at bar, the agents had abundant probable cause from weeks of surveillance, in advance of their entry, to believe that there was a criminal drug operation being

carried on in Segura's apartment . They also had information that Segura probably had more cocaine in the apartment. Under those circumstances, not present in the case at bar, the officers in Segura had good cause to believe evidence might be destroyed. The Court, in Segura, ruled out the officers' bad faith and considered the situation that happened in the case at bar unlikely:

> "In the first place, an entry in the absence of exigent circumstances is illegal. We are unwilling to believe that officers will routinely and purposely violate the law as a matter of course. Second, as a practical matter, officers who have probable cause and who are in the process of obtaining a warrant have no reason to enter the premises before the warrant issues, absent exigent circumstances which, of course, would justify the entry. Third, officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case. Finally, if officers enter without exigent circumstances to justify the entry, they expose themselves to potential civil liability under 42 U.S.C. § 1983. *Id.* at 811-2 (citations omitted)

The situation in the case at bar is inapposite to these basic underlying principles or the facts of Segura. *Id.* In Segura, the Court recognized that the interception of the persons who were to deliver cocaine to the apartment may have alerted the apartment occupants and led to the removal or destruction of evidence. The Court did not find the speculation under those circumstances too far fetched. Unlike the seized persons in Segura, Butler was not known to be involved in an operation with Kirk. Thus, the Court's conclusions in Segura are not applicable to the case at bar.

The lower courts sustained Officer Brunet's confusion of probable cause with exigent circumstance: "Once it was confirmed that crack cocaine was being sold from that location, we secured the premises due to this exigent exigent circumstances and obtained a search warrant for the target location" (Mot. Tr. 3-4). This testimony shows that Brunet believed finding cocaine on Butler gave him both probable cause for the arrest and an exigency to enter the apartment without a warrant. He did not initially state that Butler's arrest created the exigency. It was not until Officer

Brunet was pressured to explain his determination of an exigency that the officer offered another conclusory statement: "The exigent circumstances believing that the illegal contraband could be destroyed."..."Once information that we had actually detained someone that left the apartment —we thought the information would get back to them and they would destroy the contraband." (Mot. Tr. 13). This information was also included in the affidavit that was used later to obtain a warrant (App. 4). However, the officer's insistence on that conclusion cannot be sustained. The basis of their conclusion is just a speculation that the occupants might learn of the stop and that they might destroy evidence as a result. It was certainly not proof that the alleged evidence was in the process of destruction which was required to support a warrantless entry.

The Court in McDonald found that the officers' claim of an exigency had to be supported by the evidence 355 U.S. 451. The inconvenience or undesirable delay in getting a warrant is not such an exigency that will allow the constitutional barrier that protects the privacy of the individual to be hurdled so easily. In McDonald, as in the case at bar, the officers' observations on the scene gave them "adequate grounds for seeking a search warrant", but not adequate grounds for entering the apartment without a warrant and securing one later. *Id.* In the instant case, the circumstances bearing upon the necessity to make this search without a warrant are absent from this record.

In Ker v. California, 374 U.S.23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963), the Court considered **only** whether there was a valid search incident to arrest after a warrantless entry with a passkey from the landlord. The Court specifically did not look at any other issues (e.g. the validity of the entry) that were not specifically raised in Ker's writ application. Importantly, the Court in Ker noted that state law validated the officers' means of entry, and under federal law the officers' entry by use of a key obtained from the manager was permissible. Furthermore, the Court found that Ker's

furtive conduct in eluding police shortly before the arrest was grounds for the belief that Ker might well have been expecting the police or destroying evidence.[8]

To claim the "destruction of evidence" exigency the first step logically must be to show that the apartment occupants were aware of the police presence so as to cause the reaction of feared destruction. The State of Louisiana failed to establish that Kirk or his companion had any way of learning about the arrest of an alleged buyer around the corner from the apartment (*See* diagram, App. 5). In the case at bar, Butler, who was stopped out of view of the apartment, was not expected back at the apartment. Thus, the State failed to establish the reasonableness of the officers fear of "destruction of evidence".

In another case, the Court held that a warrantless search or seizure may not be allowed even when there is an exceptional circumstance under which the necessary evidence is in the process of destruction Welsh 466 U.S. 740. After officers observed Welsh driving erratically, Welsh parked his car and walked home. The police officers arrived, entered his house and arrested Welsh without a warrant. The officers insisted that the warrantless entry and arrest were necessary because of the destruction of evidence. The Court did not accept the diminution of Welsh's blood alcohol level or destruction of evidence as an exigency, at least where the alleged crime was a misdemeanor. *Id.*

In the case at bar, like Welsh, there was no immediate threat to the public safety. No occupants attempted to leave the apartment. There were six to eight officers available who could

[8]A concurring opinion in Ker noted: "The test under the 'fresh pursuit' exception depends not, of course, upon mere conjecture whether those within 'might well have been' expecting the police, but upon whether there is evidence which shows that the occupants were in fact aware that the police were about to visit them. The Kers' lack of reaction when the officers entered and the obviousness of the evidence lying about are indicators that they were oblivious to the officers' presence. "

have kept the apartment under observation while Officer Brunet attempted to obtain a warrant. There was no evidence that someone was injured or at risk inside the apartment. *See* Mincey. There was no evidence, only conjecture, that the supposed contraband inside, if any, might be destroyed. The offense of possession with intent to distribute cocaine is serious, but so is a warrantless entry into a home. The lower Louisiana appellate courts erred in affirming the denial of the Motion to Suppress the evidence from the illegal entry and seizure, both before and after the warrant.

Officers' Actions were Not Reasonable

The New Orleans Police Department exploited the recognized exigencies and violated the Fourth Amendment when they entered Kirk's apartment without a warrant. Their actions were not reasonable. At the point of entry, they had information to use for a warrant application only. They made an investigatory stop inside the apartment. They had no recognized exigency on which to rely for the warrantless entry. Their illegal actions tainted the arrest, search, seizure, and warrant.

The Fourth Amendment says that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Its "central requirement" is one of reasonableness. Texas v. Brown, 460 U.S. 730, 739 (1983). In order to enforce that requirement, the Court has interpreted the Amendment as establishing rules and presumptions designed to control conduct of law enforcement officers that may significantly intrude upon privacy interests. The Court in Payton, said,

> Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment..... Without pausing to consider whether that broad language may require some qualification, it is sufficient to note that the warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable. 445 U.S. 585 (citations omitted).

Recently, in United States v. Knights, – U.S.–, 122 S.Ct. 587 (2001), Knights was convicted on evidence seized during a warrantless search of his apartment by his probation officer. The Court only had to determine that the search was reasonable as the warrant requirement was waived by the probation condition. The Court said:

> The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *Id.* at 588 (citations omitted).

The Court concluded that Knights' status as a probationer affected both sides of that balance and allowed a search on reasonableness, rather than probable cause.

In the instant case, the sanctity of Kirk's home was invaded. It is the most protected area, where he had the highest expectation of privacy. The state interest in the warrantless intrusion was one of convenience and expediency. The allegation of "destruction of evidence" was speculative and unsupported by the evidence. Applying the reasonableness test set forth in Knight, the officers' action against Kirk were unreasonable. *Id.*

Candidly, Officer Brunet admitted, "no judge or magistrate would have signed the warrant" on the information that they had before entry was made (Trial Tr. 21). Brunet's testimony was the strongest of the t' ..e officers yet he could only claim the 'possibility' that evidence might be destroyed (Mot. Tr. 6) based on the stop of the fourth suspected buyer "in relatively close proximity to the target location" (Mot. Tr. 3, App.3). Brunet did not say that there was any way that the location of the stop could be viewed from Kirk's apartment. He did not claim that Butler, knew Kirk or was expected to return to the apartment so that Butler's absence might arouse Kirk's suspicion. He did not say that there were bystanders who observed Butler's arrest and could alert Kirk. Brunet gave

only his generalized conclusion that he had an exigent circumstance (Mot. Tr. 4, App. 3). The Court considered the officer's actions of holding the suspect outside of his home for about two hours while other officers applied for a warrant in McArthur, 531 U.S. 326, cited p.11. McArthur's wife went to the home, in the company of officers, to get her belongings after a domestic dispute. The officers had probable cause to believe that McArthur had hidden marijuana in his home because of information they obtained from his wife. When the officers were denied access to the home by McArthur, one officer held McArthur on the porch while the other went with the wife to get a warrant. Twice, the officer waited in the doorway and watched McArthur when he went inside to get cigarettes or make phone calls. The execution of the search warrant revealed a pipe, box and marijuana. The Court in McArthur noted:

> **"Moreover, the restraint at issue was tailored to that need, being limited in time and scope, cf. Terry v. Ohio, supra, at 29—30, and avoiding significant intrusion into the home itself,** cf. Payton v. New York, 445 U.S. 573, 585 (1980)... Consequently, rather than employing a per se rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable. Cf. Delaware v. Prouse, 440 U.S. 648, 654 (1979) (determining lawfulness by balancing privacy and law enforcement interests); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). 121 S.Ct. at 950.

The Court found the restriction of McArthur on the porch was reasonable, and hence lawful, in light of the following circumstances: 1) the police had probable cause to believe that McArthur's trailer home contained evidence of contraband, based on first hand, reliable information from his wife; 2) the police had good reason to fear that McArthur would destroy the drugs before they could return with a warrant because McArthur knew his wife and police had been at the trailer; 3) the police neither searched the trailer nor arrested McArthur before obtaining a warrant. Rather, they imposed a significantly less restrictive restraint, preventing McArthur only from entering the trailer

unaccompanied. They left his home and his belongings intact–until a neutral Magistrate, finding probable cause, issued a warrant; 4) the police imposed the restraint for a limited period of time. *See Id.*

Applying the McArthur factors to the officers' actions in regard to Kennedy Kirk's apartment, the privacy-related concerns outweigh the law enforcement-related concerns and the officers' intrusion was unreasonable. First, Officer Brunet admitted that "no judge or magistrate would sign a warrant" on the information he had before the entry of the apartment. The officers in this case had no facts indicating that there were drugs in the apartment. There was only a three hour surveillance and four alleged transactions, not indicative of a large scale operation. Police did not know who or what was inside Apartment 15. There had been no particular allegations about the apartment from their anonymous, hotline tip. There is no evidence that the officers knew Kirk, Cook, or Butler. The officers lacked probable cause to believe there were still drugs in Apartment 15, unlike McArthur where the wife saw drugs in McArthur's trailer.

Second, the police had no good reason to fear that, unless the apartment was immediately entered, seized and restrained, that the evidence would be destroyed. Indeed, the circumstances indicate the contrary. The officers stayed outside the Washington Avenue apartment building for over three hours, seeing alleged transactions only during the last hour. They did not know if there were anymore drugs in the apartment, so they could not predict evidence destruction. There was nothing indicating that anyone in the apartment knew of Butler's arrest. There was no good reason to fear that the drugs inside the apartment, if any, would be destroyed. In contrast, in McArthur, the officer had confronted McArthur about his wife's allegation that he had drugs and McArthur saw his wife leave with the officer.

Third, in the instant case, the police made no reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy. Even with six to eight officers on the scene, they did not consider maintaining the surveillance while getting the warrant. Continuing surveillance would have satisfied their law enforcement needs. Unlike McArthur, they entered the apartment and seized Kirk and Cook, handcuffed and searched them and seized everything in view. Whereas in McArthur, the Court found it significant that the officers remained *outside*, McArthur was not restrained, but was allowed supervised access to the home, and the officers in McArthur "left his home and his belongings intact--until a neutral Magistrate, finding probable cause, issued a warrant." *Id.* Significantly, the Court said that the intrusion in McArthur of temporarily keeping him from entering his home was "less serious" and "considerably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search". McArthur was not searched or arrested before the officer returned with the warrant.

The factor most similar to McArthur is the fourth one, in regard to time. In both cases, the police imposed the restraint for a limited period of time, namely, two hours. But the restraint imposed in this case was much more intrusive than the officers' action in McArthur of detaining McArthur on the porch. Intrusion into Kirk's apartment had already occurred. In the case at bar, law enforcement interests in expediency eradicated all of Kirk's privacy interests. There was no balance. The officers' actions were unreasonable. Considering all of the factors in balancing the law enforcement needs and the privacy requirements, under McArthur, the Fourth Circuit Court of Appeal erred in affirming the denial of the Motion to Suppress the Evidence. The majority of the Louisiana Supreme Court erred in denying review of that decision. This Application for Writ of Certiorari must be granted.

In Segura 468 U.S. 796, unlike the present case, no one in Segura denied the illegality of the initial entry into the apartment without a warrant and without exigent circumstances. *Id.* It was also agreed by the parties in Segura that the items in plain view, where the view was the result of the illegal entry, had to be suppressed. The Court decided only the admissibility of the results of the later search performed after the warrant was obtained. The warrant in Segura was not based on information obtained during the entry Segura, 468 U.S. at 804, 104 S.Ct. at 3385, n. 4. The Court held that where officers, having probable cause, enter premises, and arrest the occupants, and, for no more than a brief period, secure the premises from within to preserve the status quo while other officers, in good faith, are in the process of obtaining a warrant, there is no violation of the Fourth Amendment's proscription against unreasonable seizures. *Id.*

In the case at bar, the officers did not act in good faith or reasonably. The officers used the information obtained in the illegal entry of Kirk's apartment in the warrant application (App. 5; Mot.Tr. 11, App. 3). Officer Brunet admitted that he had not applied for a warrant before the illegal entry because he knew the magistrate would not sign it (Trial Tr. 21). When the officers made a forcible entry into Kirk's apartment, there had not been the extensive surveillance.

The instant case is like Taylor v. United States, 286 U.S. 1, 52 S.Ct. 466, 76 L.Ed.2d 951 (1932), where the officers made an unlawful entry onto the premises, and made a seizure of illicit whiskey that was deemed unreasonable. As in the case at bar, in Taylor, the search and seizure were undertaken with the hope of securing evidence upon which to indict and convict Kirk. Officer Brunet, in Kennedy Kirk's case, used the evidence from the search and seizure of Kirk and his apartment first to get a search warrant (App. 5) and later, to secure his conviction. The Court in Taylor, in pertinent part, said:

> [T]here was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility. We think, in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed. *Id.* at 6 (citations omitted).

In Trupiano, 334 U.S. 699, this Court defined its role in cases involving search and seizure issues: "the Fourth Amendment is a recognition of the fact that in this nation individual liberty depends in large part upon freedom from unreasonable intrusion by those in authority. It is the duty of this Court to give effect to that freedom." The purpose of the Fourth Amendment's requirement of reasonableness

> is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted--even if a later, less virtuous age should become accustomed to considering all sorts of intrusion reasonable.

Minnesota v. Dickerson, 508 U.S. 366, 380, 113 S.Ct. 2130, 2139, 124 L.Ed.2d 334 (1993) (*SCALIA, J.*, concurring). The warrantless invasion of Kirk's home without a proven exigency is disrespectful of the privacy guaranteed by the Fourth Amendment. It is not a practice that this Court should allow the New Orleans Police Department to become accustomed to promote. As such, this application for writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons, Petitioner prays that a writ of certiorari issue to review the decision of the majority of the Supreme Court of the State of Louisiana, in a four to three split, denying Kennedy Kirk's Application for Writ of Certiorari, and letting stand the decision of the lower appellate court. The warrantless invasion of Kirk's home without a proven exigency is disrespectful of the privacy guaranteed by the Fourth Amendment. This Application for Writ of Certiorari should be granted to address the violation of the Fourth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949); Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Respectfully submitted:

Dated 5 February 2002

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NO. 01-8419 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

KENNEDY KIRK, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDENT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT FOR THE STATE OF LOUISIANA

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20pp

KENNEDY KIRK, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDENT

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State of Louisiana

VERSUS

Kennedy D. Kirk

NOV 9 2001

GFC **CALOGERO, Chief Justice, dissents and assigns reasons.**

I dissent from the majority's denial of this writ because I believe the lower courts erroneously denied the defendant's motion to suppress. The Fourth Amendment to the United States constitution has drawn a firm line at the entrance to the home, and thus, the police need both probable cause to either arrest or search and exigent circumstances to justify a nonconsensual warrantless intrusion into private premises. State v. Welch, 449 So.2d 468, 470 (La. 1984). Pursuant to La. Code Crim. Proc. art. 703, the state has the burden of proof on the admissibility of evidence seized without a warrant. Here, the defendant was arrested inside an apartment, without a warrant, and the state has not demonstrated that exigent circumstances were present. Consequently, defendant's arrest was unconstitutional, and his motion to suppress should have been granted.

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PARISH OF ORLEANS

STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS # 398-116

KIRK, KENNEDY SECTION G

Motion hearing taken in the above-captioned matter before the HONORABLE JULIAN A. PARKER, Judge presiding Section G taken on the 1st of June, 1998.

APPEARANCES:

ADA JOHN JERRY GLAS

Representing the State of Louisiana

JACK DOLAN, O.I.D.P.

Representing the defendant

REPORTED BY:

BRIAN P. SALZER
CERTIFIED COURT REPORTER

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A. I was working with my partner, Detective Brumfield.

Q. Okay. And on that date, did you have the occasion to arrest Kirk Kennedy?

A. Yes, we did.

Q. Was this arrest concurrent with a search warrant, the execution of a search warrant?

A. That's correct.

Q. Could you please tell me the facts and the circumstances that were the basis for the search warrant?

A. On the day in question, myself and my partner, Detective Brumfield, set up a surveillance on the target location that was highlighted by the Sixth District Task Force hotline complaint. During that surveillance, we had a high foot traffic going back and forth from the apartment. We could observe from our location U.S. currency being exchanged for small packages of some sort. Later on into the surveillance, there was a black male subject that examined the contraband he had just purchased from the target location. Right across the street from the vehicle, we were holding a surveillance. At that time, we called in a takedown unit, which they took the subject down near the corner of LaSalle and Washington which is in relatively close proximity to the target location. Once it was confirmed that crack cocaine was being sold from that location, we secured the premise

App. 3, p. 3

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search warrant for the target location.

Q. And did you personally prepare that search warrant?

A. Yes, I did.

MR. GLAS:

May I approach, Your Honor?

THE COURT:

Yes.

EXAMINATION BY MR. GLAS:

Q. I'm going to show you what I'm marking as S-1 for the purposes of the motion hearing only. Can you identify S-1 for the Court?

A. (Witness reviewing exhibit.) Yes, this is the search warrant I prepared for the target location which is 2316 Washington Avenue, Apartment Number 15.

Q. And is that apartment on the first floor, or is it, in fact, on the second floor?

A. It's on the second floor.

Q. And when you saw these transactions taking place, how far away were these transactions taking place from this apartment? What was the relationship?

A. Right in front of the door.

Q. Right in front of the door?

A. Right, they were walking to the door.

Q. Did you have the occasion to execute this search warrant?

A. Yes, we did.

Q. Okay. And what happened when you executed the search warrant?

App. 3, p. 4

based on the exigent circumstances. And at that time, we frisk-searched the subjects for weapons upon entering the apartment. The subject, Kennedy Kirk, was in possession of a plastic -- it looked more like a medicine bottle. I think he had like 53, 58 pieces, something like that of crack cocaine on his person.

Q. Okay. And when you say on his person -- and you may go ahead and refer to the incident report to refresh your memory. Do you have it?

A. It was located in his front underpants, I believe.

Q. Okay. And was that crack cocaine alone, or was it inside a plastic bottle, or anything like that?

A. I think it was inside a plastic bottle.

Q. Okay. Was Mr. Kennedy alone in the apartment, or was there someone else there by the name of Paul Cook?

A. Yes, there was also a Mr. Paul Cook. And if I'm not mistaken, at the time we entered, when we entered the apartment, he ran over to -- there was a chair located between the bed and I think there was another dresser or something over there. And he sat on top of a weapon. I'm not sure what it was. I think it might have been a nine millimeter or something.

App. 3, p. 5

a search of Mr. Paul Cook as well?

A. Yes. Mr. Cook was also in possession of I think like 19 rocks that he had in one of his front pants pockets.

Q. Okay. And do you see Mr. Kirk Kennedy present here in the courtroom here today?

A. Yes, he's seated next to the defense attorney in the orange OPP uniform.

Q. And do you see Mr. Paul Cook present in the courtroom today?

A. No.

MR. GLAS:

Okay. At this time, Your Honor, the State tenders the witness.

THE COURT:

Cross-examination?

EXAMINATION BY MR. DOLAN:

Q. All right, Officer, let me ask you this: You stated on March 5th, 1998 approximately 7:15 p.m.?

A. On what?

Q. On March 18th?

A. Okay.

Q. Have you got that?

A. No.

Q. You were there. All right, you received information of some activity in the 2300 block of Washington Avenue?

A. The task force received information.

Q. The task force?

A. It went to Sergeant --

App 3, p. 6

out of that apartment complex. Was there any foot traffic directly going to one specific apartment at that point in time?

A. I didn't say in and out of the apartment complex. I said to that apartment.

Q. Okay. Now you stated some information came through an informant. Did that informant narrate to your sergeant and he in turn narrate to you the possible number that was handling this traffic, the possibility of that narcotics activity?

A. I was already in possession of the apartment number when I originally set up the surveillance.

Q. Okay. You set up that surveillance. Then you saw activity. Then you saw some of what you believe somebody made a purchase, correct? Did you, yourself, after that purchase was made by that individual, did you, yourself, or your partner stop that individual and check him out to see if he had any contraband on him?

A. No, but we directed a takedown on that individual.

Q. A takedown. That means a stop, correct?

A. Correct.

Q. How far was that arrest made from that particular complex?

A. Like I stated earlier, it was within a hundred yards of that apartment.

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A. It was near the intersection of LaSalle and Washington.

Q. All right. When this takedown as you stated was made on that subject, whoever he may be, did you have an idea of where that individual came out of or what apartment he came out of at that time?

A. We saw him purchase the contraband. That's why I directed the takedown on that individual.

Q. I'm saying Apartment A, B, 1, 2, 3. Anything designated?

MR. GLAS:

Objection, argumentative. He's answered it.

THE COURT:

Overruled.

THE WITNESS:

Like I stated earlier, Apartment Number 15. That was the location.

EXAMINATION BY MR. DOLAN:

Q. Fifteen, okay, all right. Based on that information, what did you do? Is that when you went out to secure the search warrant or one of the officers secured the search warrant based on some activity coming out of Apartment 15?

A. Once the subject was taken down, he was transported to the Sixth District Police Station. He was interrogated by Sergeant Gaudet, Sergeant Poole. At that time, we were

App. 3

the target location. And upon doing so, based on the exigent circumstances, the apartment was secured and then we obtained the search warrant.

Q. The information was coming from an individual who had been placed under arrest for possession of cocaine, right? It wasn't from any informant? It was from an individual subject who you interrogated at the district station?

A. That particular takedown was.

Q. Right, the takedown person?

A. Correct.

Q. Your information was based primarily for you to secure that search warrant, right?

A. If the sergeant obtained information from that individual, we didn't need his information. We already had our own information. We were already working that information. I called in the takedown on that individual after I observed him purchasing illegal contraband from Apartment Number 15. He just confirmed everything that we already knew.

Q. All right. That arrested subject from what I gather from the application was a fellow by the name of Leslie Butler?

A. That's correct.

Q. And based on that, you say the stoppage and the arrest of that subject, you went and secured a search warrant from the

App. 3, p.

correct?

A. That's correct.

Q. All right. Now, to your knowledge, during the time that that search warrant was secured, was any activity going on at that apartment by any members of the New Orleans Police Department knocking on doors, pushing doors in, anything like that?

A. Ask the question again.

Q. I'm saying who -- put it this way. Let's start with this premise: Who went to get that warrant, you?

A. Yeah, I wrote the warrant, correct.

Q. You wrote the warrant?

A. After we had secured the residence.

Q. To your knowledge, was any activity going on by NOPD at that particular apartment, Number 15, during the absence of you going to secure that warrant?

A. We left officers in the apartment, that's correct.

Q. You had officers in the apartment?

A. That's correct. Like I stated earlier, we secured the apartment. We entered the apartment and secured it. Then we obtained the search warrant. Once we entered the apartment to secure it, all the subjects in the apartment were searched.

Q. How did you secure the apartment? That's what I can't figure out. How did you secure the apartment? What right gave you to

App. 3, p.

A. The exigent circumstances believing that the illegal contraband would be destroyed.

MR. GLAS:

I object.

THE COURT:

Go ahead and finish.

THE WITNESS:

Once information that we had actually detained someone that left the apartment -- we thought the information would get back to them and they would destroy the contraband.

EXAMINATION BY MR. DOLAN:

Q. You had somebody who left the apartment? Who was that?

MR. GLAS:

Now I'd like to object. I'm going to object to the whole line of questioning. It calls for a legal conclusion. This Court is here to decide whether they had the right to enter the apartment. He's asking him, "What right did you have?"

THE COURT:

Objection overruled. Proceed.

EXAMINATION BY MR. DOLAN:

Q. What right did you have to enter that apartment?

MR. GLAS:

Asked and answered.

THE COURT:

He's already answered that.

App. 3, p. 13

ORDER OF SEARCH

TO: THE SUPERINTENDENT OF THE NEW ORLEANS DEPARTMENT OF POLICE and/or HIS DESIGNATED REPRESENTATIVES.

AFFIDAVIT(S) HAVING BEEN MADE BEFORE ME BY: Det. John A. Brunet #582

THAT he has good reason to believe that on or in the (premises) (person) (vehicle) located at 2316 Washington Ave, apartment #15 within the Parish of Orleans, State of Louisiana, as more fully described in the application for this warrant, there is now being concealed certain property, namely, All contraband controlled dangerous substances, more particularly, crack cocaine with any concomitant physical evidence, either substantive or trace, associated with it's use, possession, packaging and distribution.

WHICH said property constitutes evidence of the commission of a crime or offense against the laws of the State of Louisiana set forth in the Louisiana Revised Statutes, and as I am satisfied from the affidavit(s) submitted in support of the application for this warrant that there is probable cause to believe that the aforesaid grounds for the issuance search warrant exist;

YOU ARE HEREBY ORDERED to search forthwith the aforesaid (premises) (person) (vehicle) for the property specified, serving this search warrant and making the search, and if the property be found there, to seize it, leaving a copy of this warrant and a receipt for the property seized, to make your written return on this warrant including a written inventory of the property seized, and to bring the said seized property into the court (before the judge, the clerk, the sheriff, or any court officer who usually acts as the custodian) within ten days of this date as required by law.

YOU ARE (ARE-NOT) AUTHORIZED to execute this warrant and to make this search during the daytime or the nighttime and if the property herein described be found on the (premises) (person) (vehicle) herein described to seize said property in accordance with law.

YOU ARE (ARE-NOT) AUTHORIZED to execute this warrant and make this search on a Sunday and if the property herein described be found on the (premises) (person) (vehicle) herein described to seize said property in accordance with law.

THIS WARRANT MADE IN DUPLICATE ORIGINAL, NEW ORLEANS, LOUISIANA, THIS 05th DAY OF March 1998.

JUDGE, SECTION ____ CRIMINAL DISTRICT COURT

COPIES:
Original: Unit File
1st Copy: Issuing Magistrate
2nd Copy: Person Being Served
3rd Copy: District Attorney
4th Copy: Issuing Magistrate Upon making Return

NOPD Form 117-A (rev. 7/73)

1x 345

AND STATE OF LOUISIANA

On Thursday, March 5, 1998, at approximately 7:15pm, Detective John Brunet, assigned to the Sixth District Task Force, was on surveillance in the 2300 block of Washington Ave. The target location was and upstairs apartment on the second floor, and was visible from Washington Avenue. The detectives obtained this information from a Sixth District hot-line complaint form, stating that narcotics were being sold from this location day and night. The detectives then formulated a plan for the surveillance, and a take down unit on the outer edge of the target location.

At or about 8:15 pm, Detective Brunet had observed what appeared to be several drug transactions as a short brown skin, b/m subject known to the detectives as "Paul", and a taller b/m subject known as "Kennedy", served several subjects from the door of the apartment. The subjects exchanged U.S. currency for a small package of some sort, believed by the detective to be crack cocaine.

Based on Detectives Brunet's eight years of undercover narcotics experience, a take down was called after a subject attired in a brown jacket, and gray sweat pants purchased contraband. He attempted to walk from the area. The subject was taken down near the intersection of Washington and Lasalle Street and found to be in possession of crack cocaine. After he was advised of his Miranda rights, and the charges pending he admitted to the detectives, Sgt S. Gaudet and Sgt. S. Poole that he purchased the contraband from a second floor apartment located at 2316 Washington Ave. apartment number #15. This conformed the facts and circumstances listed in the hot-line complaint, and the surveillance observation made by Detective Brunet from his surveillance vehicle, parked across the street from the apartments.

The arrested subject was identified as Leslie Butler, b/m, D.O.B. 7-18-54, residing at 4600 Laurel st. apt #4. He was arrested and booked accordingly.

The Detectives immediately secured the apartment do the exigent circumstance, based on the amount of foot traffic in the area, and believing that word of the arrest would get back to the occupants of the apartment, and vital evidence would be destroyed.

Based on the above listed circumstances Detective John A. Brunet respectfully request, that this warrant be signed ordering the search of apartment #15, located at 2316 Washington Ave.

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 5TH DAY OF SEPTEMBER, 1998
NEW ORLEANS LOUISIANA

AFFIANT

MAGISTRATE COMMISSIONER

11:39

At 10:40 pm, on 04-05-98, I the undersigned member of the New Orleans Department of Police, executed the foregoing search warrant as follows:

I searched the residence described in said search warrant, and I left a copy of said warrant with premises, together with a receipt for the items seized.

The following is an inventory of the property seized pursuant to the said foregoing search warrant:

E-1 (1) PLASTIC FILM CANISTER CONTAINING (58) PIECES OF A WHITE ROCK
E-2 (1) PLASTIC FILM CANISTER CONTAINING (19) PIECES OF A WHITE ROCK
E-3 (2) GLASS TUBES CONTAINING RESIDUE
E-4 (1) CLEAR PLASTIC TUBE CONTAINING RESIDUE
E-5 (1) BLACKFILM CANISTER CONTAINING RESIDUE
E-6 (1) ONE BLACK/WHITE CLOTH BAG
E-7 (1) ONE CLEAR CONTAINER WITH RESIDUE
E-8 (1) CHROME SMOKING PIPE W/RED HANDLE CONTAINING RESIDUE
E-9 $283.00 IN U.S. CURRENCY
E-10 (1) BLUE STEEL SEMI-AUTO HANDGUN .380 CAL. 4"IN BARREL, IMEZ
E-11 (1) IMEZ .380 CAL MAGAZINE CLIP
E-12 (8) .380 CAL CARTRIDGES
E-13 (1) BLUE STEEL .22 CAL REVOLVER, 2" BARREL R.G. W/BROWN GRIPS
E-14 (6) .22 CAL CARTRIDGES
E-15 (1) ENVELOPE CONTAINING VARIOUS PAPERS
E-16 (1) ONE BLACK MARKSMAN REPEATER BB HANDGUN
E-17 (1) BOX CONTAINING (6) .45 CAL CARTRIDGES

The following is a list of all persons arrested pursuant to service of the search warrant:

PAUL COOK, N/M, D.O.B. 11-20-67, RESIDING AT 2316 WASHINGTON AVE.

KIRK KENNEDY, N/M, D.O.B. 2-2-64, RESIDING AT 2316 WASHINGTON AVE.

The following is a list of all persons listed as wanted pursuant to service of the search warrant:

NONE

This return made in duplicate original, in the presence of Sergeant Steven Gaudet/S. Poole, on this 06th day of March, 1998, New Orleans, Louisiana.

DET. JOHN BRUNET
Badge No. 582

lesser intrusive investigatory stop is that in the former, a reasonable person would not feel that he is free to leave, while in the latter, a reasonable person would feel free to leave after identifying himself and accounting for his suspicious actions; it is the circumstances indicating intent to effect an extended restraint on the liberty of the accused that is determinative of when an arrest occurs. U.S.C.A. Const.Amend. 4.

[8] Arrest ⇐63.4(1)
35k63.4(1)

A warrantless arrest must be based on probable cause. U.S.C.A. Const.Amend. 4.

[9] Arrest ⇐63.4(2)
35k63.4(2)

Probable cause for a warrantless arrest exists when the facts and circumstances, either personally known to the arresting officer or of which he has reasonably trustworthy information, are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. U.S.C.A. Const.Amend. 4.

[10] Arrest ⇐63.4(2)
35k63.4(2)

Probable cause for a warrantless arrest is assessed by an objective standard that must withstand the detached, neutral scrutiny of a judge. U.S.C.A. Const.Amend. 4.

[11] Arrest ⇐63.4(2)
35k63.4(2)

In determining whether probable cause existed for a warrantless arrest, the court should take into account the practical considerations of everyday life on which average police officers can be expected to act. U.S.C.A. Const.Amend. 4.

[12] Arrest ⇐63.4(2)
35k63.4(2)

The determination of probable cause for a warrantless arrest, although requiring something more than bare suspicion, does not require evidence sufficient to support a conviction; probable cause, as the very name implies, deals with probabilities. U.S.C.A. Const.Amend. 4.

[13] Arrest ⇐63.4(2)
35k63.4(2)

The determination of probable cause for a warrantless arrest, unlike the determination of guilt at trial, does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands. U.S.C.A. Const.Amend. 4.

APPEAL FROM CRIMINAL DISTRICT COURT ORLEANS PARISH NO. 398-116, SECTION "G" Honorable Julian A. Parker, Judge JUDGE MICHAEL E. KIRBY

Harry F. Connick, District Attorney, Juliet Clark, Assistant District Attorney, New Orleans, LA, Counsel for Plaintiff/Appellee.

Junki Kim, Student Attorney Tulane Law School Community Services Program, Sherry Watters, Louisiana Appellate Project, New Orleans, LA, Counsel for Defendant/Appellant.

(Court composed of Judge WILLIAM H. BYRNES, III, Judge MICHAEL E. KIRBY, Judge TERRI F. LOVE).

KIRBY.

*1 STATEMENT OF THE CASE:

The defendant and co-defendant, Paul Cook, were charged by bill of information with possession of cocaine with intent to distribute on May 18, 1998. La. R.S. 40:967. The defendant was arraigned and pled not guilty on May 21, 1998. He filed a motion to suppress evidence which was denied June 1, 1998. A twelve member jury found the defendant guilty as charged September 22, 1998. He was sentenced November 23, 1998, to fifteen years at hard labor without benefit of parole, probation, or suspension of sentence. He filed a motion for reconsideration of sentence that was denied. He filed a motion for appeal that day.

ERRORS PATENT:

[1] La. R.S. 40;967(B)(4)(b) provides that only the first five years of the sentence be served without benefit of parole, probation or suspension of sentence. Because the defendant was sentenced without those benefits on the entire fifteen year sentence, the denial of those benefits on the last ten years of his sentence are deleted.

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App. 2, p. 2

FACTS:

Detective John Burnett testified at trial that he and his partner, Detective Derrick Brumfield, went to the 2300 block of Washington Avenue on March 5, 1998, around 5:00 p.m. to observe the apartment in question. At the motion to suppress hearing, the officer testified that they went to the location in response to a citizen complaint. Once there, they saw a person approach the apartment and exchange currency for a small object. They continued watching the apartment and saw a total of four apparent narcotics transactions. Burnett saw the defendant complete a transaction. After the fourth transaction, Burnett ordered that the buyer be "taken down." Detective Steven Gaudet and his partner stopped the man. Because the stop took place within a block of the apartment, Burnett feared that evidence would be destroyed and ordered that the apartment be entered. Upon the officers' entering, the defendant sat on a gun. Another weapon was on a table to the defendant's left. Both defendants were "secured." Officers obtained a search warrant. After the warrant was obtained, a search of the defendant revealed fifty-eight pieces of crack cocaine and $283.00. The officers seized a cooking tube from the apartment.

ASSIGNMENT OF ERROR:

[2] The defendant argues the trial court erred in denying the motion to suppress evidence. He makes a long argument that there were not exigent circumstances for entering the apartment without a warrant. However, the evidence required to prove that the defendant possessed cocaine with the intent to distribute, namely the cocaine and the money, was not found in the apartment, but on his person. The only items found in the apartment were a cooking tube and guns, and the defendant was not charged with a firearms offense.

[3][4][5][6][7][8][9][10][11][12][13] This court recently reviewed the law on point in State v. Dorsey, 99-1819, pp. 5- 6 (La.App. 4 Cir. 4/19/00), --- So.2d ----:

*2 On trial of a motion to suppress, the State has the burden of proving the admissibility of all evidence seized without a warrant. La.C.Cr.P. art. 703(D); State v. Jones, 97-2217, p. 10 (La.App. 4 Cir. 2/24/99), 731 So.2d 389, 395, writ denied, 99-1702 (La.11/5/99), --- So.2d----, 1999 WL 1038367. A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court has the opportunity to observe the witnesses and weigh the credibility of their testimony. State v. Mims, 98-2572, p. 3 (La.App. 4 Cir. 10/5/99), 752 So.2d 192, 1999 WL 1012969. "In reviewing a trial court's ruling on a motion to suppress, an appellate court is not limited to evidence adduced at the hearing on the motion to suppress; it may also consider any pertinent evidence given at trial of the case." State v. Nogess, 98-0670, p. 11 (La.App. 4 Cir. 3/3/99), 729 So.2d 132, 137.

A search conducted without a warrant is per se unreasonable, subject only to a few specifically established and well-delineated exceptions. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); State v. Tomasetti, 381 So.2d 420, 423 (La.1980). One of those exceptions is a search of a person and the area within his immediate control incident to a lawful arrest. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); Tomasetti, 381 So.2d at 423. La.C.Cr.P. art. 201 defines arrest as "the taking of one person into custody by another [by] actual restraint of the person." The distinguishing factor between an arrest and the lesser intrusive investigatory stop is that in the former, a reasonable person would not feel that he is free to leave, while in the latter, a reasonable person would feel free to leave after identifying himself and accounting for his suspicious actions- "it is the circumstances indicating intent to effect an extended restraint on the liberty of the accused" that is determinative of when an arrest occurs. State v. Allan, 95-1754, p. 6 (La.9/5/96), 682 So.2d 713, 719.

A warrantless arrest must be based on probable cause. State v. Jackson, 450 So.2d 621, 627 (La.1984); State v. Creecy, 98-1472, p. 6 (La.App. 4 Cir. 7/14/99), 742 So.2d 615, 619. Probable cause exists when the facts and circumstances, either personally known to the arresting officer or of which he has reasonably trustworthy information, are sufficient to justify a man of ordinary caution in believing that the person to be arrested has committed a crime. State

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App. 2, p. 3

v. Johnson, 98-2544, p. 6 (La.App. 4 Cir. 11/17/99), 748 So.2d 527, 1999 WL 1080209; State v. Bryant, 98-1115, p. 5 (La.App. 4 Cir. 8/4/99), 744 So.2d 108, 111. Probable cause is assessed by an objective standard that must withstand the "detached, neutral scrutiny of a judge." State v. Fisher, 97-1133, p. 8 (La.9/9/98), 720 So.2d 1179, 1184 (quoting State v. Flowers, 441 So.2d 707, 712 (La.1983), cert. denied, 466 U.S. 945, 104 S.Ct. 1931, 80 L.Ed.2d 476 (1984)). In determining whether probable cause existed, the court should take into account the "practical considerations of everyday life on which ... average police officers can be expected to act." Id. (quoting State v. Raheem, 464 So.2d 293, 296 (La.1985). The determination of probable cause, although requiring something more than bare suspicion, does not require evidence sufficient to support a conviction; probable cause, as the very name implies, deals with probabilities. State v. Green, 98-1021 (La.App. 4 Cir. 12/22/99), --- So.2d ----, 1999 WL 1257281. The determination of probable cause, unlike the determination of guilt at trial, does not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands. Id.

In this case, the officers received information from a citizen that drugs were being sold from an apartment. They observed the defendant come to the door and complete drug transactions. They stopped a buyer and found him in possession of cocaine. They immediately knocked on the door of the apartment, arrested the defendant, searched him thereto and discovered the cocaine and the money. The officers had probable cause to arrest and properly searched the defendant incident thereto. The trial court properly denied the motion to suppress. This assignment is without merit.

CONCLUSION:

*3 Therefore, we affirm the conviction, delete the denial of benefits on the last ten years of the sentence, and affirm as amended.

AFFIRMED AND AS AFFIRMED AMENDED.

END OF DOCUMENT

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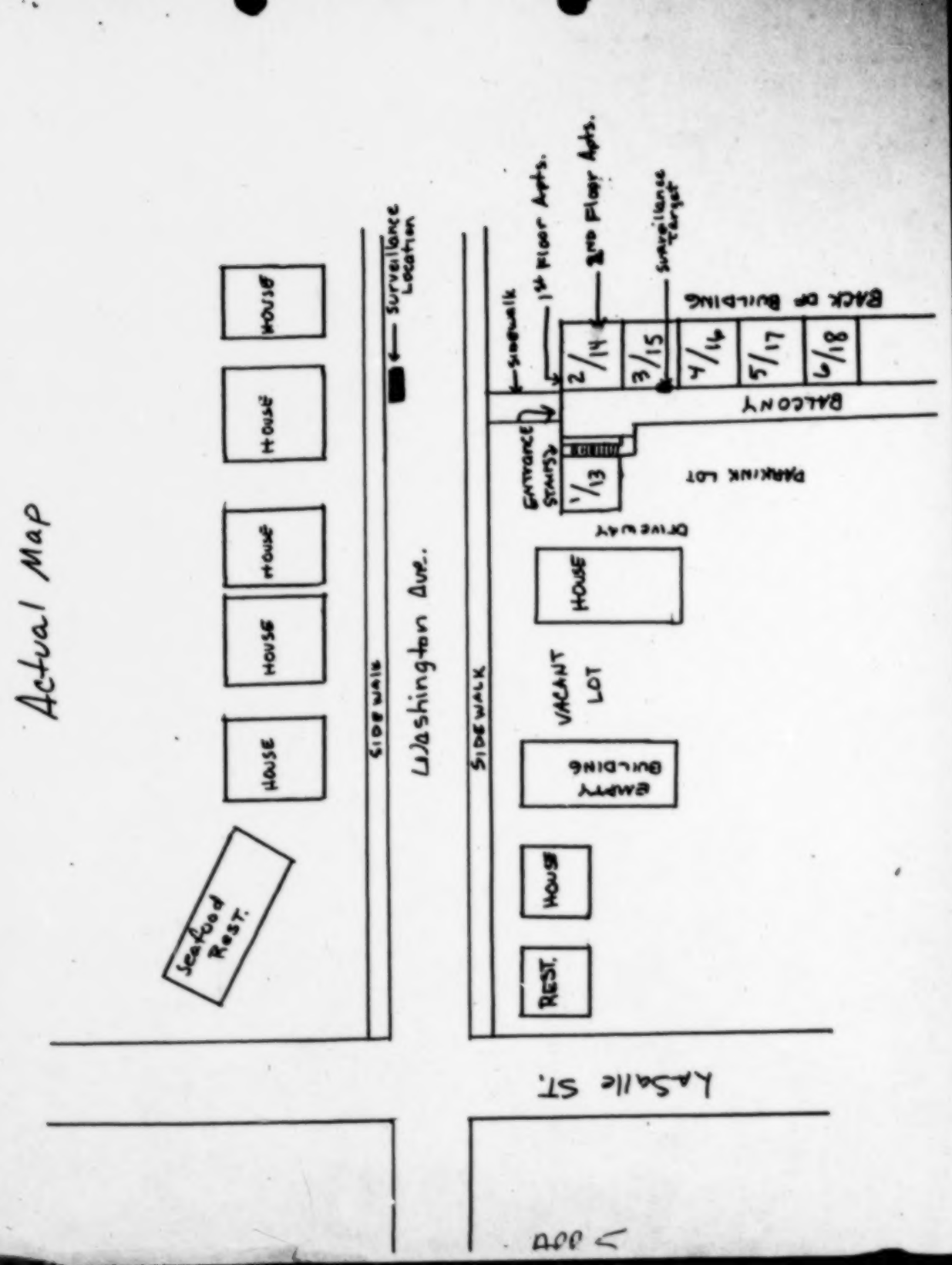
App. 2, p. 4



RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
MAY 18 2002
CLERK

NO. 01-8419

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

KENNEDY KIRK,
Petitioner

v.

STATE OF LOUISIANA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION BY THE STATE OF LOUISIANA, RESPONDENT

HARRY F. CONNICK
DISTRICT ATTORNEY
OF ORLEANS PARISH

ANNE MORRISS DICKERSON
ASSISTANT DISTRICT ATTORNEY
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MAY IT PLEASE THE COURT:

Respondent, the State of Louisiana (hereinafter "the State"), respectfully requests that this Court deny the applicant's petition for a writ of certiorari, seeking review of the decision of the Louisiana Supreme Court summarily denying his application for writ of certiorari. Said denial of certiorari is reported as State v. Kirk, 2000-KH-3395 (La. 11/09/01) 801 So.2d 1063. Copies of the transcripts from the hearing on petitioner's motion to suppress and petitioner's trial, as well as copies of the affidavit, order of search and return, are attached hereto as Exhibits "A," "B," and "C". Also included are copies of the decisions of the Louisiana Fourth Circuit Court of Appeal and the Louisiana State Supreme Court, attached hereto as Exhibits "D" and "E."

PROCEDURAL HISTORY

Petitioner, Kennedy Kirk was charged by bill of information with possession with the intent to distribute crack cocaine, in Orleans Parish Criminal District Court case number 398-116 "G." (Rec. p. 1-2); La. R.S. 40:967(B)(1).[1] The trial court found probable cause for the petitioner's arrest, and denied his motion to suppress the evidence. At the trial held September 22, 1998, a 12-member jury found the petitioner "guilty as charged" of possession of cocaine with the intent to distribute it. On November 23, 1998, the trial court sentenced the defendant to serve fifteen years at hard labor in the custody of the Department of Corrections. It is from his conviction in case 398-116 "G" that petitioner now seeks certiorari.

An appeal was taken on March 27, 2000, urging that the trial court erred in denying the defendant's motion to suppress the evidence. The Louisiana Fourth Circuit affirmed his conviction and sentence, noting that the defendant's argument that there were no exigent

[1] Paul Cook was charged in the same bill of information with possession with the intent to distribute crack cocaine. Charges against Cook were dismissed on September 22, 1998, following his death.

circumstances to justify the warrantless entry of the apartment was irrelevant as the evidence was not found in the apartment but on his person, stating "The officers had probable cause to arrest and properly searched the defendant incident thereto." State v. Kirk, 00-KA-0190, 773 So.2d 259 (La. App. 4 Cir. 11/15/00). Petitioner did not seek a re-hearing in the Fourth Circuit. On December 12, 2000, petitioner applied to the Louisiana Supreme Court for writ of review.

The Louisiana Supreme Court summarily denied petitioner's writ on November 9, 2001, with four justices voting to deny the writ, and three to grant the writ. State v. Kirk, 2000-KH-3395 (La. 11/09/01) 801 So.2d 1063. Chief Justice Calogero dissented from the denial of certiorari with written reasons, stating that the defendant was arrested inside an apartment without a warrant, and that the State had not established that exigent circumstances were present. The instant application for certiorari followed.

FACTS OF THE CASE[2]

Members of the New Orleans Police Department received a hotline complaint alleging that drugs were being sold from 2316 Washington Avenue, Apartment 15. Exhibit A, Motion p. 2, l. 17-19, l.23-24; p. 4, l. 15-16. In response to this complaint, Detective John Brunet and other members of the New Orleans Task Force initiated a covert surveillance of the apartment on May 5, 1998. Exhibit A, Motion p. 2, l. 17-19, l. 23-24; p. 3, l. 3-5.

During the police surveillance, Detective Brunet witnessed approximately four suspected narcotics transactions at the apartment, in which persons approached the apartment door and exchanged currency for small packages. Exhibit B, Trial p. 3, l. 13-27. Apartment occupants Kennedy Kirk and Paul Cook were seen participating in these transactions. Exhibit B, Trial p. 3,

[2] Louisiana law permits appellate review of a motion to suppress to be based on evidence presented both at the motion hearing, and at trial. State v. Nogess, 98-0670, 729 So.2d 132, 137; State v. Carter, 94-2859,664 So.2d 367 (La. 11/27/95).

l. 28-32; p.4, l. 1-10. When Brunet observed a purchaser later identified as Leslie Butler examine the contraband by the door, and again upon reaching the sidewalk, Brunet was left with no doubt that Butler had purchased contraband narcotics from the occupants of the apartment. Exhibit B, Trial p. 4, l. 15-23. When a takedown team stopped Butler near the intersection of LaSalle and Washington, approximately half of a block from the apartment at 2316 Washington Avenue, Butler was found to be in possession of crack cocaine. Exhibit A, Motion, p. 9, l. 29-p. 10, l. 3. Butler admitted purchasing cocaine from 2316 Washington Avenue, Apt. 15. Exhibit C, Warrant Application.

Officers elected to obtain a search warrant for 2316 Washington Avenue, Apt. 15. Exhibit B, Trial p. 6, l. 1-8. Fearing that Kennedy and Cook would be alerted to the arrest of Butler, which occurred only half a block from the apartment, the officers decided to secure the apartment prior to obtaining the warrant, to prevent the possible destruction of evidence. Exhibit B, Trial p. 6, l. 1-8; Exhibit A, Motions p. 13, l. 9-13 During this initial warrantless entry of the apartment, police officers frisked occupants Kirk and Cook, but did not seize any evidence from them. Exhibit B, Trial p. 11, l. 1-19.[3] Officers observed narcotics paraphernalia in plain view, but did not seize it. Exhibit B, Trial p. 10, l. 13-19; p.12-15. Officers secured two handguns which were within the reach of Kirk and Cook. Exhibit B, Trial p. 8, l. 7-10; p. 9, l. 22-24; p. 10, l. 16-19. Detective Brunet left the apartment to obtain a warrant, while other officers, the defendant, and Cook, waited in the apartment. Exhibit B, Trial p. 20, l. 24-p. 21, l. 1.

Within approximately two hours, Detective Brunet obtained a search warrant. Exhibit B,

[3] In Detective Brunet's motion hearing testimony, he discusses a frisk search of the Petitioner which revealed "a plastic medicine-type bottle in his front underclothes." Exhibit A, Motion p. 14, l. 23-27. The frisk search took place when the apartment was secured. Detective Brunet's trial testimony clarifies that while objects were felt on petitioner and the codefendant during the frisk search, those items were not recovered until after the warrant was obtained, as stated above.

Trial p. 20, l. 11-23. The warrant application contained information regarding the surveillance of the apartment, the takedown of Leslie Butler, and Butler's admission that he had purchased cocaine from the target apartment. Exhibit C, Warrant Application. The application stated that the apartment had been secured pending application for the warrant, but contained no information learned by the officers during the initial warrantless entry. Id[4]

When Detective Brunet returned with the warrant, the officers seized evidence which they had observed in plain view in the front room of the apartment, including two clear glass tubes containing cocaine residue, a black film case containing cocaine residue, a clear plastic container with cocaine residue, and a chrome smoking pipe. Exhibit B, Trial p. 12-15; p. 33-34. During a search of Kennedy Kirk, officers recovered a plastic container containing fifty-nine pieces of crack cocaine from Kirk's underwear, and 283 dollars. Exhibit B, Trial p. 11, l. 24-27. Police recovered a plastic container containing nineteen pieces of crack cocaine from Paul Cook's pocket. Exhibit B, Trial p. 11, l. 24-27; Paul Cook and Kennedy Kirk were placed under arrest. Exhibit B, Trial p. 17, l. 26-p. 18, l. 2.

SUMMARY

Petitioner's application for certiorari should be denied for the following reasons.

There is no point to be served by this Court reviewing this issue. No conflict within the federal circuits can be addressed, and/or corrected, nor is there a need to correct an improper application of federal law, or federal Constitutional issues.

The State contends that under the facts of this case, the circumstances were such that the

[4] Petitioner incorrectly alleges that information learned during the initial entry into the apartment was included in the search warrant. Although when questioned in this regard, Det. Brunet stated "I'm sure its in there," the question referred to the mere fact of whether the magistrate had been informed that the apartment had been seized. Exhibit B, Trial p. 27, l. 21-25. An examination of the warrant application reveals that no facts learned during the initial entry were placed in the application. Exhibit C, Warrant Application.

officers were justified in the good faith belief that their investigation had been compromised and that evidence would be destroyed if they did not secure the premises prior to obtaining a search warrant. However, the State submits that there is no purpose in this Court granting certiorari on this issue, when the independent source doctrine, an exception to the exclusionary rule, would permit the introduction of the seized items even if this Court determined that the officers' initial entry into the apartment was without exigency and illegal.

ARGUMENT

I. Through their investigation, including the takedown of a purchaser, officers had established probable cause to believe that the petitioner was actively selling crack cocaine from the target apartment. Exigent circumstances justified the officers' actions in entering and securing the apartment and its occupants prior to obtaining a warrant.

A. Probable Cause

Probable cause to arrest or search exists when the facts are such that a reasonable man would be warranted in believing that the person to be arrested has committed a crime, or that evidence of a crime can be found in the place to be searched. Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964). The expertise and experience of a police officer may be taken into account in a determination of probable cause.

In the instant case, Detective Brunet observed approximately four suspected narcotics transactions, in which people approached the apartment and gave money to either the petitioner or Paul Cook in exchange for a small package. Detective Brunet observed the final purchaser, Leslie Butler examine his package closely upon returning to the sidewalk, and was left with no doubt that Butler had purchased narcotics. A takedown of Butler confirmed that he was in possession of crack cocaine, and Butler admitted to officers that he purchased this cocaine from the target apartment. Clearly officers had probable cause to believe that Petitioner and Cook were

engaged in the distribution of crack cocaine from the apartment, and that additional quantities of crack cocaine could be recovered from the apartment.

Petitioner argues that the officers did not believe there was probable cause to search or arrest at the time of the initial entry.[5] However, an officer's subjective intent is irrelevant to the objective determination of whether probable cause exists. Moreover, Detective Brunet testified that the residence was entered for the purpose of securing it to prevent the destruction of evidence while a warrant was sought, therefore officers clearly intended to obtain a warrant and believed there was probable cause. Exhibit B, Trial p. 5, l. 28-p. 6, l. 8.[6]

B. Exigent circumstances existed which justified the officers entry to secure the apartment to prevent the destruction of contraband prior to obtaining a warrant.

A warrantless seizure by law enforcement, based upon probable cause may be lawful where exigent circumstances, such as the potential destruction of evidence exist. Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966); Illinois v. McArthur, 531 U.S. 326, 121 S.Ct. 946, 148 L.Ed.2d 838.

Here, officers observed several individuals make suspected purchases of narcotics, before they stopped Butler and confirmed that Kirk and Cook were distributing narcotics from the apartment. Butler was stopped approximately one half block from the apartment, at the

---

[5] In support of his argument, Petitioner cites the following exchange between defense counsel and Detective Brunet:

Q: Based on the information you had, why didn't you go for the warrant before you entered the place? It's not enough information to obtain the search warrant?"

A: No Judge or Magistrate would have signed it.
Exhibit B, Trial, p. 21, 2-7.

[6] Sergeant Steve Gaudet when asked whether Brunet had enough information to get a warrant stated "Sure he did. He observed the transaction." Exhibit B, Trial p. 53, l. 23-28.

intersection of LaSalle and Washington. Officer testified that due to the nearness of the stop to the apartment, and the pedestrian traffic in the area, they believed that the occupants of the apartment might be alerted to the surveillance. Having just observed four transactions occur at that apartment, officers were clearly justified in believing that persons passing the scene of the takedown would inform the occupants of the apartment of the arrest of Butler. Officers feared the destruction of contraband.

Moreover, it appears from the record that the takedown took place within view of the apartment. Detective Brunet testified:

> As I stated earlier, the apprehension [apartment?] was in the middle of the block. The take down was on LaSalle Street which is like half a block away. Half a block away. We were supposed to go down once he made the turn and was out of the view of the apartment we were supposed to take him down. According to the plan, we were to take down the subject, seize the apartment and I would have moved to obtain a search warrant but it didn't happen that way.

Exhibit B, Trial p. 26, l. 29-p.27, l. 6.

II. The officers properly obtained a valid search warrant predicated upon information known to them before the initial entry into the apartment, and were not prompted to obtain that warrant by information learned during the initial entry. The independent source doctrine therefore permits the admission of the seized evidence regardless of whether exigent circumstances existed to justify the initial entry.

The independent source doctrine is an exception to the exclusionary rule and permits the introduction of illegally obtained evidence where the police had an independent source for the discovery of the evidence.

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that facts thus obtained become sacred and inaccessible . If knowledge of them is gained from an independent source they may be proved like any others. . .

Silverthorne Lumber Co. V. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920); *see*

also Segura v. United States, 468 U.S. 796, 805, 104 S.Ct. 3380, 82 L.Ed. 2d 599 (1984) (noting that evidence is not to be excluded if police had an independent source); Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) (same). The basis for the rule is the well-established principle that "evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint'." Segura, 468 U.S. at 797, 104 S.Ct. 3380 (*citing* Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

In the instant case, officers had already decided to seek a search warrant prior to the entry into the apartment and detention of the defendant. Detective Brunet testified that the purpose of the entry into the apartment was to prevent the destruction of evidence while a warrant was being obtained. Therefore, the officers' observations during the entry did not prompt officers to seek a search warrant. Additionally, contrary to petitioner's representations, no information discovered during the initial entry was included in the application for the warrant. (Exhibit) The warrant application contains only information learned prior to the entry, and notes that the apartment was secured without any reference to the persons found therein, or items seen therein.

Assuming *arguendo* that the initial entry was illegal, the officers did not exploit this illegality, but obtained a valid search warrant within a short period of time, approximately two hours. The information known to the police prior to the entry provides an independent source for the issuance of a valid search warrant for the apartment. In the initial entry, officers conducted a frisk search of the persons present, and such limited search of the apartment as was necessary to ascertain that no weapons were accessible to the petitioner or Cook. As the evidence was seized during the execution of a valid search warrant, and subsequent arrest of the defendant, the Fourth Circuit correctly concluded that a finding of exigent circumstances was irrelevant to a

determination of the admissibility of the evidence recovered, and that the evidence was recovered pursuant to a search incident to a valid arrest.

CONCLUSION

For the foregoing reasons, petitioner Kennedy Kirk should be denied a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anne M. Dickerson, a member of the bar of this Court, hereby certify that a copy of this Brief in Opposition to the application of Kennedy Kirk for a writ of certiorari has been mailed to counsel for petitioner, postage pre-paid and addressed to:

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This 13th. day of March, 2002
New Orleans, Louisiana

Per Curiam

SUPREME COURT OF THE UNITED STATES

KENNEDY D. KIRK *v.* LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

No. 01–8419. Decided June 24, 2002

PER CURIAM.

Police officers entered petitioner's home, where they arrested and searched him. The officers had neither an arrest warrant nor a search warrant. Without deciding whether exigent circumstances had been present, the Louisiana Court of Appeal concluded that the warrantless entry, arrest, and search did not violate the Fourth Amendment of the Federal Constitution because there had been probable cause to arrest petitioner. 00–0190 (La. App. 11/15/00), 773 So. 2d 259. The court's reasoning plainly violates our holding in *Payton* v. *New York*, 445 U. S. 573, 590 (1980), that "[a]bsent exigent circumstances," the "firm line at the entrance to the house . . . may not reasonably be crossed without a warrant." We thus grant the petition for a writ of certiorari and reverse the Court of Appeal's conclusion that the officers' actions were lawful, absent exigent circumstances.*

On an evening in March 1998, police officers observed petitioner's apartment based on an anonymous citizen complaint that drug sales were occurring there. After witnessing what appeared to be several drug purchases and allowing the buyers to leave the scene, the officers stopped one of the buyers on the street outside petitioner's residence. The officers later testified that "[b]ecause the stop took place within a block of the apartment, [they]

*We also grant petitioner's motion for leave to proceed *in forma pauperis*.

Per Curiam

feared that evidence would be destroyed and ordered that the apartment be entered." 773 So. 2d, at 261. Thus, "[t]hey immediately knocked on the door of the apartment, arrested the defendant, searched him thereto and discovered the cocaine and the money." *Id.*, at 263. Although the officers sought and obtained a search warrant while they detained petitioner in his home, they only obtained this warrant after they had entered his home, arrested him, frisked him, found a drug vial in his underwear, and observed contraband in plain view in the apartment.

Based on these events, petitioner was charged in a Louisiana court with possession of cocaine with intent to distribute. He filed a pretrial motion to suppress evidence obtained by the police as a result of their warrantless entry, arrest, and search. After holding a suppression hearing, the trial court denied this motion. Petitioner was convicted and sentenced to 15 years at hard labor.

On direct review to the Louisiana Court of Appeal, petitioner challenged the trial court's suppression ruling. He argued that the police were not justified in entering his home without a warrant absent exigent circumstances. The Court of Appeal acknowledged petitioner's argument: "[Petitioner] makes a long argument that there were not exigent circumstances for entering the apartment without a warrant." *Id.*, at 261. The court, however, declined to decide whether exigent circumstances had been present, because "the evidence required to prove that the defendant possessed cocaine with the intent to distribute, namely the cocaine and the money, was not found in the apartment, but on his person." *Ibid.* The court concluded that because "[t]he officers had probable cause to arrest and properly searched the defendant incident thereto . . . [, t]he trial court properly denied the motion to suppress." *Id.*, at 263.

The Louisiana Supreme Court denied review by a vote of 4 to 3. In a written dissent, Chief Justice Calogero

explained:

> "The Fourth Amendment to the United States constitution has drawn a firm line at the entrance to the home, and thus, the police need both probable cause to either arrest or search and exigent circumstances to justify a nonconsensual warrantless intrusion into private premises. . . . Here, the defendant was arrested inside an apartment, without a warrant, and the state has not demonstrated that exigent circumstances were present. Consequently, defendant's arrest was unconstitutional, and his motion to suppress should have been granted." App. to Pet. for Cert. 1–2.

We agree with Chief Justice Calogero that the Court of Appeal clearly erred by concluding that petitioner's arrest and the search "incident thereto," 773 So. 2d, at 263, were constitutionally permissible. In *Payton*, we examined whether the Fourth Amendment was violated by a state statute that authorized officers to "enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest." 445 U. S., at 574. We determined that "the reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home." *Id.*, at 576. We held that because "the Fourth Amendment has drawn a firm line at the entrance to the house . . .[, a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.*, at 590. And we noted that an arrest warrant founded on probable cause, as well as a search warrant, would suffice for entry. *Id.*, at 603.

Here, the police had neither an arrest warrant for petitioner, nor a search warrant for petitioner's apartment, when they entered his home, arrested him, and searched him. The officers testified at the suppression hearing that the reason for their actions was a fear that evidence would be destroyed, but the Louisiana Court of Appeal did not

determine that such exigent circumstances were present. Rather, the court, in respondent's own words, determined "that the defendant's argument that there were no exigent circumstances to justify the warrantless entry of the apartment was irrelevant" to the constitutionality of the officers' actions. Brief in Opposition 2–3. As *Payton* makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home. The Court of Appeal's ruling to the contrary, and consequent failure to assess whether exigent circumstances were present in this case, violated *Payton*.

Petitioner and respondent both dispute at length whether exigent circumstances were, in fact, present. We express no opinion on that question, nor on respondent's argument that any Fourth Amendment violation was cured because the police had an "independent source" for the recovered evidence. Brief in Opposition 8. Rather, we reverse the Court of Appeal's judgment that exigent circumstances were not required to justify the officers' conduct, and remand for further proceedings not inconsistent with this decision.

It is so ordered.